



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

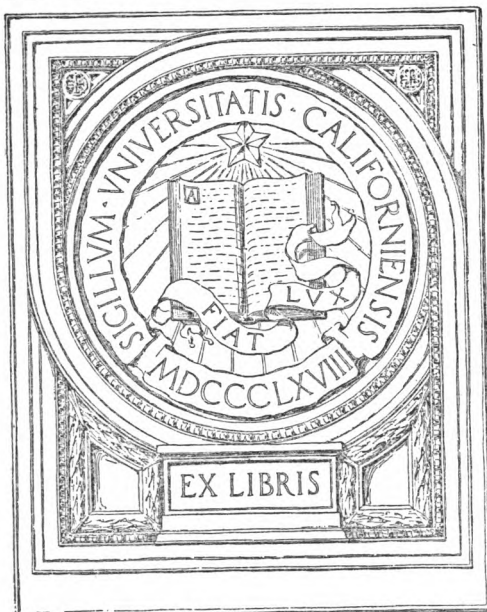
UC-NRLF



B 4 436 308

EO. T. BISEL CO.
W PUBLISHERS
AND STATIONERS
SANSOM STREET
PHILADELPHIA

SCHOOL OF JURISPRUDENCE



EX LIBRIS

299as
P4 M6

MONTGOMERY COUNTY

REPORTS OF CASES

THE COURTS OF MONTGOMERY COUNTY,

THE SUPREME COURT OF PENNSYLVANIA,

FOR THE YEAR 1890.

VOL. VI.

OF THE MONTGOMERY COUNTY BAR.

NORRISTOWN, PA.:

1891.

TO VIRU
ALBROTLAO

JURISPRUDENCE

TABLE OF CASES.

	PAGE
Allebach vs. Hunsicker,	39
Alderfer, Lynch et al. vs.	108
Anders vs. Gerhard,	193
Bank, Tradesmen's National of Conshohocken, Wood vs.	31
Bank, Third Nat., of Phila., endorsee, &c., vs. Hunsicker, .	73
Bank, Nat., of Royersford vs. Davis,	99
Bank, First Nat., vs. Brodhead,	132
Bean et al., Freyman vs.	163
Bertolet, Tyler vs.	79
Bethlehem, South, vs. Davis,	80
Bevan & Bro. vs. Thackara et al.,	170
Bevan & Bro. vs. Thackara,	173
Bishop et al. vs. Cowden et al.	201
Blake's Estate,	197
Bodey & Livingston vs. Thackara et ux. et al.,	149
Bond of Noah W. Weikel,	70
Bradley vs. Ritchie,	36
Bridgeport, Borough of, Wood vs.	101
Brodhead, First Nat. Bank vs.	132
Brunner's Estate,	115
Burkert & Walters, Riding vs.	153
Cain vs. Cain,	34
Charter, Application for	13
Chestnut Hill &c., Turnpike Road Co. vs. The Penn'a. R. R. Co.	105
Chestnut Hill &c., Turnpke Road Co. vs. The Penn'a. R. R. Co.	121
Connel, Extr'x, West vs.	196
Conshohocken, West, Reid vs.	205
Conshohocken Borough of, Costello vs.	103
Commonwealth vs. Holstine,	130
Commonwealth vs. Parks,	141

	PAGE
Cook vs. Neal,	147
Cook vs. Hoffman et al.	176
Costello vs. Borough of Conshohocken,	103
Cowden et al., Bishop et al. vs.	201
Cummings vs. Young et al.,	161
Davis, Nat. Bank of Royersford vs.	99
Davis, South Bethlehem vs.	80
Davis, Jenkins, Trustee, vs.	56
Dearborn vs. Raysor,	42
Dienelt et al. vs. Montgomery Web Co.,	94
Dobson vs. Penn'a. Schuylkill Valley R. R. Co.,	109
East Avenue, Jenkintown,	45
Fesmire's Estate,	89
Fox's Estate,	14
Fretz, Furth vs.	206
Freyman vs. Bean et al.,	163
Furth vs. Fretz,	206
Garrett et al., Wethered et al. vs.	9
Garrett et al., Wethered et al. vs.	11
Geiger vs. Borough of Norristown,	157
Gerhard, Anders et al. vs.	193
Guest, Grater & Co. vs. Lower Merion Water Co.,	21
Hamilton Street,	207
Hawkins' Appeal,	178
Herman vs. The Philadelphia Lumber Co.,	42
Hoffman et al., Cook vs.	176
Holstine, Commonwealth vs.	130
Hunsicker, Allebach vs.	39
Hunsicker, Third Nat. Bank, &c., vs.	73
Irwin's Estate,	88
Insurance Co., Trust Co., Guardian of Legg, vs.	17
Insurance Co., Trust Co., Guardian of Legg, vs.	49
Jenkins, Trustee, vs. Davis,	56
Kennedy's Estate,	26
Keifer et al., Uhlenback et al. vs.	52
Kite's License,	81
Konetzki's License,	82

Landes, Saunders vs.	77
Landis vs. Longenecker,	200
Longenecker, Landis vs.	200
Longstreth, Unruh vs.	33
Lower Merion Water Co., Guest, Grater & Co. vs.	21
Lynch et al. vs. Alderfer,	108
Markley's Appeal,	41
Monaghan's License,	84
Moore's Estate,	117
Moore, Mowday vs.	126
Mowday vs. Moore,	126
Moreland Township vs. Penna R. R. Co.,	165
Moreland Township vs. Penna. R. R. Co.,	167
Neal, Cook vs.	147
Newton, Shannon, Committee, &c., vs.	37
Norristown, Geiger vs.	157
Norristown vs. Norristown Passenger Railway Co.,	185
Norristown vs. Citizens Passenger Railway Co.,	189
Parks, Commonwealth vs.	141
Penna. R. R. Co., Chestnut Hill &c., Turnpike Road Co. vs.	105
Penna. R. R. Co., Chestnut Hill &c., Turnpike Road Co. vs.	121
Penna. R. R. Co., Rudolph vs.	114
Penna. Schuylkill Valley R. R. Co., John Dobson vs.	109
Penna. R. R. Co., Moreland Township vs.	165
Penna. R. R. Co., Moreland Township vs.	167
Passenger Railway Co., Norristown vs.	185
Passenger Railway Co., Citizens, Norristown vs.	189
Passenger Railway Co., Citizens, vs. Thomas,	61
Philadelphia Lumber Co., Hermann vs.	42
Poley vs. Poley,	58
Poley et al., Wagner vs.	29
Potts, Solly, Receiver, &c., vs.	209
Pysher vs. Pysher,	138
Raysor, Dearborn vs.	42
Reid vs. West Conshohocken,	205
Richardson, Thropp vs.	20
Riding vs. Burkert & Walters,	153
Ritchie, Bradley vs.	36
Road and Bridge Viewers,	154

	PAGE
Ross, Sutherland vs.	203
Rudolph vs. The Penna. Schuylkill Valley R. R. Co.,	114
Saunders vs Landes,	77
Sheetz, Solly, Receiver, &c., vs.	112
Schoner's License,	136
Shannon, Committee, &c., vs. Newton,	37
Shrawder vs. Snyder,	66
Snyder, Shrawder vs.	66
Solly, Receiver, &c., vs. Potts,	209
Solly, Receiver, &c., vs. Sheetz,	112
Sutherland vs. Ross,	203
Thackara et al., Bevan & Bro. vs.	170
Thackara et al., Bevan & Bro. vs.	173
Thackara et al., Bodey & Livingston vs.	149
Thomas, Passenger Railway Co. vs.	61
Thomas vs. West End Coal Company,	164
Tomlinson's Estate,	53
Thropp vs. Richardson,	20
Trust Co., Guardian of Legg, vs. Insurance Co.,	17
Trust Co., Guardian of Legg, vs. Insurance Co.,	49
Turnpike Road Co., The Norristown, &c.,	190
Tyler vs. Bertolet,	79
Unruh vs. Longstreth,	33
Uhlenback et al. vs. Kiefer et al.,	52
Wagner vs. Poley et al.	29
Web Co., Montg., Dienelt et al. vs.	94
Wethered et al. vs. Garrett et al.,	9
Wethered et al. vs. Garrett et al.,	11
West vs. Connell, Extr'x.,	196
West End Coal Co., Thomas vs.	164
Weikel's Bond,	70
Wilber Street,	133
Wisler's Estate,	159
Winter Street, Royersford,	24
Wood vs. Bank,	31
Wood vs. Bridgeport, Borough of,	101
Young et al., Cummings vs.	161

Court of Common Pleas of Montgomery County.

CHARLES B. WETHERED ET AL. VS. WILLIAM E. GARRETT ET AL.

- A bill of particulars attached to a mechanics' lien becomes a part thereof; and where the bill sets forth the nature or kind of work done or materials furnished, it is sufficient.
- A mechanics' lien will be held good where there is enough in the description of the situation and other peculiarities of the building to identify it.
- A boiler, steam pipes, etc., in a green-house are proper subjects of a mechanics' lien.

MOTION to strike off mechanics' lien.

Webster A. Melcher, Esq., for motion.

Henry C. Boyer, Esq., contra.

Opinion of the court by WEAND, J., November 18, 1889.

First exception. There is nothing upon the record to show that plaintiffs are not citizens of Pennsylvania, and therefore this exception can not be sustained.

The second exception sets forth that the claim does not state in its body the nature or kind of work done, or the kind of materials furnished. All this is set forth in the bill of particulars attached to the claim, and which becomes part thereof: Knabb's Appeal, 10 Penna. St. R., 186.

The third exception is that the claim does not give the location or size or a sufficient description of the several buildings therein mentioned. The claim does not mention the size of buildings, the number of stories high, nor materials of which they are composed, but describes them as buildings known as the palm-house, two green-houses, and pit or lot of ground situate, etc., with an accurate description of the land.

In Kennedy et al. vs. House, 41 Penna. St. R., 39, it was ruled that whether the description in the claim filed corresponds nearly

enough with the actual facts to identify the property, must ordinarily be referred to the jury. The locality is obviously the most important. When that is fixed, other matters of description are of comparatively minor consequence. But even in regard to locality, there is great reluctance to declare a claim invalid for mere loose description. Even in such cases it is held that the jury generally are to determine whether the property is in truth designated. See cases there cited.

In *McClintock vs. Rush*, 63 Penna. St. R., 203, it was held that when there is enough in the description of the situation and other peculiarities of the building to identify it, the statute is satisfied. The act evidently contemplated that the claimants should prepare their own papers; and unless the claim or statement of demand, as it is termed, is totally defective in giving information to purchasers and others making search for incumbrances, such as will direct them to the right place, the question as one of fact will be referred to the decision of the jury on the trial of the scire facias. Here the claim affords accurate information as to the locality, and from the peculiar nature of the buildings no one could be misled as to the particular ones intended. This case is distinguished from *Short & Ames vs. Keese*, 22 W. N. C., 354, where there was an error as to the township in which the buildings were located, and in which lien it was also impossible to tell whether it was filed against several buildings and an oil refinery, or against several buildings which with other structures constituted an oil refinery, or against an oil refinery as such. This objection is overruled.

The fourth exception alleges that the bill of particulars charges for articles for which there can be no lien filed; and the fifth, because no lien is given to persons furnishing the articles charged for in the bill of particulars. Whilst these two exceptions are vague and indefinite, we will still consider them in the light of the argument, and we think the objection is met by the case of *Parrish & Hazard's Appeal*, 83 Penna. St. R., 111, where a lien for machinery and a furnace was held good, although furnished long after the furnace was completed and in operation. The following liens have been held good: a copper boiler in a brew-house, in *Gray vs. Holdship*, 17 S. & R., 413; an engine in a saw-mill, in *Morgan vs. Arthurs*, 3 Watts, 140; and for burr mill-stones, in *Wademan vs. Thorp*, 5 Id., 115. In these times houses of the description mentioned in

Wethered et al. vs. Garrett et al.

the lien are considered as appropriate, useful and necessary, according to the character of the surroundings and the standing and taste of the owner; and we see no reason why the mechanic and material men should not have the protection of the act, especially where the owner does not object and the exception is taken by the contractor for whose benefit the lien inures. We think, however, that the items for freight \$14.26, ditto \$1.79, expense railroad fare and board \$6, and time of foreman \$10, should be stricken out.

The sixth exception is not sustained. We do not think that this is a subject for apportionment, and if so it can only be affected in the manner indicated by the act—*i. e.*, to be postponed to other liens.

The seventh exception, that the lien does not state whether or not the work was done under an entire contract, is overruled.

The eighth exception, that the lien is filed against four buildings, the owner and contractor of which are not named, is not true in fact, as the lien does mention Garrett as owner and Wynn and Henwood as contractors.

And now, November 18, 1889, the rule to strike off lien is discharged except as to the items of freight \$14.26, freight \$1.79, expense railroad fare and board \$6, and time of foreman \$10, which items are stricken out without prejudice to the remainder of the loan.

CHARLES B. WETHERED ET AL. VS. WILLIAM E. GARRETT ET AL.

Whether a lien properly states the location, size, or sufficient description of a building, is a question of fact for the jury.

The acts of 1868, P. L. 1169, and 1873, P. L. 215, allowing money to be paid into court in order to relieve the land of the lien, only apply to Philadelphia, unless extended to other counties by special acts.

On a mechanics' lien against the owner and contractor, judgment was entered by default against the owner for the amount of the claim. The owner admitted the bill and was willing to pay, but the contractor made defence that the goods were furnished on his credit and not on that of the building, and that the articles furnished were not the subject of a lien. *Held*, that the judgment against the owner should have been interlocutory only.

MOTION for judgment; to pay money into court; and to open judgment against owner.

MONTGOMERY COUNTY

Wethered et al. vs. Garrett et al.

Webster A. Melcher, Esq., for motions.

Henry C. Boyer, Esq., contra.

Opinion of the court by WEAND, J., November 18, 1889.

These three rules were taken in the same case and were argued together.

The affidavit of the contractor alleges amongst other things that the lien is defective in not stating the location or size or a sufficient description of the buildings, and that the work was done and the articles furnished on the credit of the contractor. We think this raises questions of fact to be decided by a jury. The affiant in reference to the last mentioned fact adds, "and were charged to them and were not done or furnished upon the credit of said buildings or any of them." The mere fact that they were so charged would not be conclusive that they were not furnished on the credit of the buildings, but this is stated only as a corroborative fact and not the only one. There is a distinct averment that they were not furnished as claimed.

The motion for judgment is overruled.

The motion to pay into court must also be refused.

The acts of 1868, P. L. 1169, and 1873, P. L. 215, apply only to Philadelphia; besides, if this money was paid in, and the verdict on the sci. fa. should be for the contractors, the owner might have to pay twice.

We think judgment should not have been taken for the defendant against the owner, but should only have been interlocutory. He is willing to pay whatever is due, and does not contest the lien. A judgment in favor of the contractors should inure to his benefit, for if they succeed he must pay to them and not to plaintiffs, who only claim from the owners through the contractors. As plaintiffs have their lien they can not be injured by having the judgment opened.

And now, November 18, 1889, the rules for judgment for want of a sufficient affidavit of defence and to pay money into court are discharged; and the rule to open the judgment against William E. Garrett, so far as to assess damages against him, is made absolute.

IN RE APPLICATION FOR CHARTER OF "THE EVANGELICAL LUTHERAN
AND THE REFORMED CONGREGATION OF THE OLD GOSCHENHOP-
PEN CHURCH OF MONTGOMERY COUNTY, PENNSYLVANIA."

A corporation to be chartered under the act of 1874 should be devoted to a single purpose mentioned in the act.

The objects of the corporation in this case were "to support the worship of Almighty God" and "to maintain a cemetery." The charter was refused, as the objects were distinct and separate, having no relation to each other.

William F. Dannehower, Esq., for petitioners.

Opinion of the court by WEAND, J., December 2, 1889.

The petitioners in this case are two unincorporated religious bodies who desire for certain purposes to be united as one corporation.

The object of the corporation is stated to be "to support the worship of Almighty God," etc., and also "to maintain a cemetery for the burial of the dead, and to invest the cemetery fund belonging to both congregations, the annual interest of which shall be devoted to the repairs of said cemetery."

Both of these purposes are amongst those set forth as belonging to the "first class" as set forth in the act of 1874, Sec. 1, P. L. 73, and act of 17th April, 1876, P. L. 30, so that a charter might might lawfully be granted for either purpose alone.

The objection to this charter is that it unites two separate and distinct objects in one. It is true that a church should have a burial ground for its dead, and this right would follow from its incorporation as a church; but to maintain a cemetery is a different matter. The idea conveyed by such an organization is that it shall sell lots to any person, and thus make profit. We do not suppose that this was the intention of these incorporators, but such is the effect of their petition. The Attorney General decided in an analogous case under the second class that "the general policy of the law contemplates the organization of corporations devoted to a single purpose," and refused a charter to a proposed corporation having dual or incongruous purposes: Opinions of Attorney General, 1887, 1888, p. 32. If we should grant this charter, questions of taxation, revenue returns, and other questions may arise, which will inevitably lead to litigation and trouble.

Fox's Estate.

It is also provided in the paper filed that "each congregation shall have the right to acquire, own and possess separate property, real or personal," etc. In other words, we are asked to authorize two unincorporated associations to do certain things which they could only do by being incorporated. It is unnecessary to say that we have no such power. These congregations are attempting to unite for certain purposes, and to keep up their independent organization for others; but as unincorporated associations they can not obtain rights and privileges which belong only to the incorporated.

For these reasons this charter is refused.

Orphans' Court of Montgomery County.

ESTATE OF JACOB B. FOX, DEC'D.

Where a testator bequeathed to his grand-children certain legacies "at their respective arrival at the age of twenty-one years," with a devise over in case they did not attain that age, the legatees may receive the interest of the fund for their education and maintenance during their minority, if a necessity for such support is shown.

The guardian should make application to the court for such allowance. An auditor appointed to make distribution of the testator's estate is not authorized to direct the payment of such income to the guardian of the legatees.

EXCEPTIONS to the report of Theo. W. Bean, Esq., auditor.

Charles Hunsicker, Esq., for exceptants.

John W. Bickel, Esq., contra.

The exceptions in this case related to the action of the auditor in refusing to hold that the share, under the will, coming to a minor grand-daughter was payable to the guardian, and that the income thereof should be decreed for her support during her minority.

The contention arose over the construction of the following clause in the will of the testator, viz.: "and the remaining equal or third part thereof (residuary estate) I give and bequeath unto my said two grand-daughters, Katie Fox and Martha Fox, in equal shares, at their respective arrival at the age of twenty-one years. Should one of my said grand-daughters die before her arrival at the

Fox's Estate.

age of twenty-one years without lawful issue, then shall her share be equally divided between my son Franklin, my daughter Mary, and the survivor of my grand-daughters, share and share alike. Should both of my grand-daughters die before their arrival at the age of twenty-one years without lawful issue, then shall their shares be equally divided between my son Franklin and my daughter Mary."

Martha Fox died before the testator. The share found due to Katie Fox under the above clause was \$1156.37, in addition to a special legacy of \$397.23, and all this was claimed by Joel R. Shuger as her guardian, she being a minor aged thirteen years, who also claimed that he was entitled to the income for her support and education. The auditor awarded the special legacy to the guardian, but decreed that under the above clause of the will the share of the residuary estate due the minor must remain in the hands of the executors until she arrived at the age of twenty-one years or the happening of the contingency named in that clause, and that he was not entitled to the income in this application.

The auditor says: "It is claimed that the testator being her grand-father, and also her guardian from the death of Jacob B. Fox, Jr., until the time of his death, was, therefore, in *loco parentis* to the said Katie, and that no provision was made for her support other than that contained in the legacy; that the mother, although having a separate estate, was not bound to educate and support her minor child, and therefore the guardian is entitled to the income upon the legacy for the support and education of the minor and legatee, notwithstanding the language and intent of the testator in his will." * * * "There is no present necessity for so decreeing the annual income of the legacy. The mother has a separate estate of about four thousand dollars; the guardian and step-father owns and resides on a large farm; the minor child has had for several years the sum of \$745.89 in the hands of her guardian, and it does not appear that application has ever been made for an allowance for her support; and further, that the minor is attending the public schools."

It is held in *Burrell Township vs. Guardians of the Poor*, 62 Penna. St. R., 472, that the mother if of sufficient ability, like her husband if living, is liable by the statute act of 1836, P. L. 547, Sec. 25, to maintain her children and keep them from becoming a public charge. The same rule of law prevails in other states. In *Dedham vs. Natick*, 16 Mass., 135, the court says: "The mother, after

Fox's Estate.

the death of the father, remains the head of the family; she is bound to support them if of sufficient ability. That was the law prior to the married woman's act; and we think the rule would apply with greater force now, since the wife and mother has been relieved of her former disabilities and given almost absolute control of her separate estate. Should circumstances hereafter occur to warrant it, application may be made to the court for the income for her support and education."

The testator deferred the actual benefits of the bequest until the legatee arrives at the age of twenty-one years. "A devise of property when devisee arrives at the age of twenty-one years, with a devise over in case he does not attain that age, without any reference to his having or not having issue, and when no provision is made for devisee during his minority, is contingent, and does not vest until he arrives at the age of twenty-one, unless there be something else in the will indicating an actual intention of the testator to the contrary": Sagar, Guardian, vs. Galloway et al., 113 Penna. St. R., 500. See also Reed's Appeal, 3 Crum., 125; Chess' Appeal, 6 Nor., 362; McClure's Appeal, 22 P. F. S., 414. "Where the gift of a legacy is by a testator postponed to a future time, but in the interim interest either by way of maintenance or otherwise is given to the legatee, as a general rule the legacy is deemed to vest at the death of the testator. When, however, the gift of interest or maintenance is distinct, and the direction is to pay or transfer the principal sum at the specified age or upon the conditions named, the legacy is contingent": Pleasonton's Appeal, 3 Out., 362. See also Cowden's Estate, 2 MONTG. LAW REP., 179. Seibert's Appeal, 7 Har., 49, is referred to by counsel for the guardian as sustaining his position. In that case the power of the court to award interest on the legacy for the maintenance of the legatee, the legacy being contingent, was considered, and the court say: "In disposing of such an application the Chancellor has discretionary power; there is a reference to and report by a master, or the special circumstances of each case; the order is made or enlarged, according to the nature and urgency of such circumstances. When the time arrives and the circumstances warrant the application in this case, the court will 'limit or enlarge' the means necessary according to the facts as they may then be disclosed.

Trust Co., Guardian, &c., vs. Life Insurance Co.

Opinion of the court by SWARTZ, P. J., November 11, 1889.

The legacy to Katie Fox, a grand-child of the testator, was made payable when she became of age. Whether the legatee shall receive the interest of the fund for maintenance during her minority depends upon circumstances. If she stands in necessity, the court in its discretion can direct payment of the interest for her support: Seibert's Appeal, 7 Harris, 49.

The guardian may make application to the court, and upon proper inquiry an allowance can be directed.

The auditor was authorized to make distribution of the testator's estate, and he can not direct the disposition of the interest that may accrue hereafter.

Because the legatee is a grand-child of the testator is no ground to deny her the interest of the legacy during her minority, if it is shown that such interest is required for her proper maintenance and education.

And now, November 11, 1889, the exceptions are dismissed and the report of the auditor is confirmed.

Court of Common Pleas of Montgomery County.

THE NORRISTOWN TITLE, TRUST AND SAFE DEPOSIT CO., GUARDIAN OF WILLIAM LEGG, A MINOR CHILD, vs. THE JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

A policy of insurance provided that upon the death of the insured payment should be made to the beneficiary named in the application of insurance; the beneficiary was not otherwise designated in the policy. The application was in writing, but no copy was attached to the policy.

Held, that the witness who took the insurance may testify who was the beneficiary under the policy, provided he can do so without reference to or aid from the written application.

MOTION and reasons for a new trial. 12. March Term, 1889.

G. R. Fox & Son, Esqs., for motion.

E. F. Slough and F. G. Hobson, Esqs., contra.

Trust Co., Guardian, &c., vs. Life Insurance Co.

Opinion of the court by SWARTZ, P. J., December 2, 1889.

The defendant company insured the life of Annie Crookshank. Upon her death the insurance was payable to the beneficiary named in the application of insurance. The beneficiary was not otherwise designated in the policy. No copy of the application was attached to the policy.

The plaintiff called Mr. Robbins, an agent and solicitor for the defendant company, to show that William Legg, a son of Mrs. Crookshank, was the beneficiary of the policy. Under objection we allowed the witness to make the proof, provided he could do so without any reference to or aid from the application, which was in writing. The witness testified: "Outside of any written application I know that the beneficiary under that policy of insurance was a young man by the name of William Legg; he was a son of Annie Crookshank. * * * I know that William Legg was the beneficiary under that policy of insurance, without any regard to the written application which I wrote at that time." The witness was the agent who took the insurance.

Upon the trial, as well as upon the motion for a new trial, the defendant contended that there was error in the admission of this evidence. No objection was directed to its sufficiency, only to its competency; this was the sole question discussed. After further examination and deliberation we are still of the opinion that this evidence was competent.

The act of 11th May, 1881, Sec. 1, P. L. 20, provides that policies "shall contain, or have attached to said policies, correct copies of the application as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence in any controversy between the parties to or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between the parties."

Failure to comply with the provisions of this act does not make void the contract of insurance. If the contract can be established without the aid of the written application it may be enforced. The act declares that no such application shall be given in evidence, nor shall such application be considered a part of the contract between the parties. The written application drops out of the case; the contract is verbal, so far as its terms are not set forth in the policy. In

Trust Co., Guardian, &c., vs. Life Insurance Co.

the Imperial Fire Ins. Co. vs. Dunham, 117 Penna. St. R., 473, the court say: "The application, therefore, constituted no part of the policy or of the contract between the parties, and was not receivable in evidence. The case is to be considered as if no such paper existed." If the paper has no existence, we see no reason why Robbins, the agent who took the insurance, should not name the beneficiary as given to him by the insured. This is not giving in evidence indirectly the contents of the written application but the giving of a fact which existed before there could be a written application. The name of the beneficiary must have been agreed upon before it was noted in the written application.

The policy refers to an application, but does not designate it as a written application. Evidence as to what was said when the insurance was taken supplies that part of the contract upon which the policy is silent; it does not contradict or alter the contract as set forth in the policy. The exclusion of the written application from the case does not render evidence incompetent which would have been competent if the parties had omitted the written application.

The act of 1881 was evidently passed in the interest of the insured. "The act affords protection to persons who insure their lives and property, and can injure no company conducted upon honest business principles": New Era Life Ins. Co. vs. Musser, 120 Penna. St. R., 390. In a suit upon a policy the beneficiary was often defeated by the production of a written application which contained statements for which the insured was not responsible, or which would have been corrected in the life-time of the insured had his attention been called to them by attaching a copy of the application to his policy. The defendant company continued to receive the premiums from Mrs. Crookshank; and if the defence now interposed is sustained, the result is a hardship little short of fraud, for the company received her money knowing all the while that it would make no return therefor. The company failed to comply with the requirements of the act of 1881, and now sets up its own failure as a defence to the policy.

Perhaps we were too liberal to the defendant. The plaintiff offered in evidence the application which was produced by the defendant company; it contained the name of William Legg. This offer was made for the purpose of showing the beneficiary named in the application. The parties to the contract referred to this paper

Thropp vs. Richardson.

to supply an omission; without this supply the contract was meaningless. If we had sustained this offer we fail to see how the defendant company could have had any just cause of complaint. The act of 1881, which was passed in the interests of the insured, never contemplated that such an improper use would be made of it. The admission of the application for the sole purpose of supplying the name of the beneficiary is demanded in order that justice may be done to both parties; it does no violence to the purpose of the act of 1881. If the company is to escape liability upon its policies under the present plea here interposed, then the act of Assembly becomes a snare to entrap the ignorant and enrich the insurance companies.

And now, December 2, 1889, the reasons for a new trial are dismissed and the motion is overruled.

JOSEPH E. THROPP VS. CHARLES RICHARDSON.

Where a partner furnishes materials, &c., to the firm with the knowledge and assent of his co-partners, he may recover the value thereof in an action of assumpsit.

A and B dissolved partnership and had a settlement of the firm accounts. B was to pay all the legitimate liabilities of the firm. A brought suit against B on a book account for articles furnished the firm, alleging knowledge and assent to such sales by his partner. On the trial B offered to show that in the settlement of the firm accounts A had made overcharges. The evidence was rejected because to receive it would be to re-open the partnership account.

MOTION for new trial.

Henry C. Boyer, Esq., for motion.

Childs & Evans, Esqs., contra.

Opinion of the court by WEAND, J., December 2, 1889.

We think that Bust and others' Appeal, 70 Penna. St. R., 301, and Freck vs. Blakiston, 80 Id., 474, sustain the position assumed by the court in this case, that where a partner furnishes materials to a partnership of which he is a member, with the knowledge and assent of his partners, that he can recover for materials so furnished.

The question as to whether Thropp furnished the stone to the firm with the knowledge and consent of Richardson was submitted as a fact to be found by the jury, and they found in the affirmative. By the agreement of dissolution the defendant was to pay all the

Guest, Grater & Co. vs. Lower Merion Water Co.

legitimate liabilities of the copartnership that appeared on the firm books or that could be ascertained therefrom. The jury found that the claim in dispute was a legitimate liability appearing on the books, etc. Difficulties existing between the partners led to a dissolution of the firm, and by articles of dissolution all the firm property passed to defendant, who paid plaintiff a certain amount on withdrawal. This was a complete and final settlement of partnership accounts, and we are bound to assume that charges of fraud or irregularities brought by one against the other were taken into consideration and given due weight in the settlement. In this trial it was attempted to offset plaintiff's claim by counter claims against him as partner, and based upon the very things which led to the dissolution. The court overruled these offers as not legitimate defences in this suit. To allow them to enter into this trial would have the effect of opening the former settlement and involve an investigation of the partnership accounts in the face of the fact that the articles of dissolution *prima facie*, if not absolutely, covered the same transactions and were final. We can not sustain either of the reasons for a new trial.

And now, December 2, 1889, the motion for a new trial and for judgment *non obstante veredicto* is overruled, and judgment is entered in favor of plaintiff on the verdict of the jury for \$944.81.

GUEST, GRATER & CO. VS. LOWER MERION WATER CO.

The buildings, franchises, etc., of a corporation for supplying water to the public, and necessary for carrying on its operations, are not subject to a mechanics' lien.

MOTION to strike off lien.

Henry C. Boyer, Esq., for motion.

Bickel & Hobson, Esqs., contra.

Opinion of the court by WEAND, J., January 6, 1890.

The lien in this case is filed against a two-story brick pumping station, with additions, etc., owned by the Lower Merion Water Co., a corporation chartered under the provisions of the act of 29th April, 1874, Sec. 34, P. L. 93, P. D. 852.

Vol. VI.—4.

A motion has been made to strike off the lien, because the defendant being a corporation chartered for public purposes its buildings, etc., necessary for carrying on its operations are not subject to a mechanics' lien, and the case of *Foster & Co. vs. Fowler & Co.*, 10 P. F. S., 27, is cited as directly ruling the point. On the part of the lien creditors it is urged, however, that the reasoning of this and kindred cases is no longer applicable since the passage of the act of 7th April, 1870, P. L. 58, which gives a remedy by *fi. fa.* instead of sequestration, as under the act of 16th June, 1836, Sec. 72, P. L. 755.

It is undoubtedly true that the franchises and corporate property of a corporation not being a county, township or other public corporate body, can now be sold under a *fi. fa.*, and that a creditor need no longer apply for a sequestrator; but the difficulty in the plaintiff's way in this case is that there is no execution process to which he can resort under either of the above recited acts, and hence his lien is of no avail.

Prior to the act of 1836 a creditor had no remedy to enforce his claim against the franchises or property of a corporation, in its nature public and necessary to its corporate existence, as was shown by C. J. Tilghman in *Ammant vs. Turnpike Co.*, 13 S. & R., 210, in which case he expressed his regret that such was the law, and recommended some mode of sequestration. No doubt his remarks led to the passage of the act of 1836, by which a proper remedy was provided. Under that act when an execution against a corporation had been returned unsatisfied, in part or in the whole, the plaintiff in the judgment could petition for a writ to sequester the goods, etc., of a corporation.

By the act of 1870, Sec. 1, P. L. 58, it was provided that in *addition* to the provisions of the 72d section of the act of 16th June, 1836, and *in lieu* of the provisions or proceedings by sequestration under said act, the plaintiff might have execution by *fi. fa.*, etc., by which the property, franchises, rights, etc., of a corporation could be sold.

It has, however, been held by Judge McCandless, of the United States Circuit Court, in *Fox vs. The Hempfield R. R. Co.*, 8 Phila., 639; by Judge Mitchell, in *Flagg vs. Farnsworth et al.*, 12 W. N. C., 500; and by Judge McDermitt, in *Bank vs. Gibbs & Sterrett Mfg. Co.*, 13 W. N. C., 174, that the provisions of the act of 1870 are only in addition to the provisions of the 72d section of the act of

Guest, Grater & Co. vs. Lower Merion Water Co.

1836, and that therefore there can be no writ to sell the franchise or corporate property until after a return under the first *fi. fa.* This view of the case seems also to have been adopted by C. J. Thompson in *Phila. & Balt. C. R. R. Co. Appeal*, 20 P. F. S., 355, and by Judge Simonton in *Com. vs. Susq. & Del. River R. R. Co.*, 7 *Crumrine*, 306. As opposed to this view we have the decision of Judge White in *Williams vs. Lawrenceville R. R. Co.*, 21 *Pitts. L. J.*, 187. And in *Lusk's Appeal*, 42 *Leg. Int.*, 376, Judge Paxson said "the sale was made upon an ordinary writ of *feri facias*. There appears to have been no attempt to comply with the provisions of the act of April 7, 1870." And then adds, "We need not discuss the question whether a return of *nulla bona* should have preceded the levy and sale upon the *feri facias*. If necessary, which we do not assert, it is but an irregularity," etc.

After a careful reading of these apparently conflicting decisions, we agree with Judge McDermitt that, "as this *fi. fa.* is in 'lieu' of sequestration, it is reasonable to presume that the Legislature intended its aid should be called into action by the same precedent return of *nulla bona*, which was absolutely necessary before a writ of sequestration could be obtained by any creditor under the act of 1836." If this position is correct, then this lien can not be sustained; for, as was said by Judge Lowrie in *Williams vs. The Controllers, &c.*, 6 *H.*, 275, "where there can be no execution there can be no action, and as a *levari facias* is the only execution proper on a judgment on a mechanics' lien," there can not be a return of *nulla bona* on a *fi. fa.*, and therefore nothing upon which to base the *fi. fa.* allowed by the act of 1870. The principle laid down in *Foster & Co. vs. Fowler & Co.*, *supra*, was recognized in *Girard Storage Co. vs. Southwark Foundry*, 15 *W. N. C.*, 25, and is still therefore the law governing this case. As before the passage of the act of 1870 this lien would not have been good, and as it is not helped by that act, the plaintiffs must resort to some other remedy to enforce their claim.

And now, January 6, 1890, the mechanics' lien No. 22, June T., 1889, is stricken from the record, and the judgment thereon by default for want of an appearance is set aside.

Court of Quarter Sessions of Montgomery County.

IN RE WINTER STREET, ROYERSFORD.

The court will not pass upon the merits of a proposed road while a petition for a review is pending.

A road leading from a terminus in a borough to a terminus in a township must be laid out and opened under the general road law.

That jurors were paid excessive fees after they concluded their labors and announced their conclusions, is not a sufficient ground to set aside the report.

EXCEPTIONS to report of a jury laying out said street.

E. L. Hallman, Esq., for petitioners.

Bickel & Hobson, Esqs., for exceptants.

H. D. Saylor, Esq., contra, for Daniel Springer.

Opinion of the court by SWARTZ, P. J., May 8, 1889.

We dismissed the exceptions and confirmed the report without putting in writing our reasons for such action. Our reasons were suggested to the parties during the argument of the exceptions. As the proceedings are to be reviewed by the Supreme Court, we deem it proper to file a written opinion.

Exceptions were filed on behalf of the county. These exceptions raised two questions: First, that the court had no jurisdiction to appoint the jury under the general road law of 1836; secondly, that the damages were excessive.

No evidence was offered to support the exception that the damages were excessive, and a petition for a review was pending at the time. This petition for a review was filed by the second exceptant, S. B. Latshaw, and ten other citizens, and is still pending.

The proposed road begins in the borough of Royersford and terminates at a point outside of the borough in the township of Upper Providence. This terminus is in a highway in the township.

The proceedings could not be brought under the acts of April 3, 1851, and April 22, 1856, for one of the termini is beyond the limits of the borough: Somerset and Stoystown Road, 74 Penna. St. R., 61. The borough does not complain of the proposed road located partly within its limits, nor is there any evidence to show that this road was extended beyond the borough limits so that the dam-

In re Winter Street.

age might be imposed upon the county. If the proposed road had ended at the borough limits, its terminus would not be accessible from any other opened highway; and if the citizens of the borough and township see fit to carry the road to such other highway in the township, so as to make the road more useful, we see nothing to prevent it. It is then a road leading from a terminus in the borough to a terminus in the township, and must be opened and laid out under the general road law.

Samuel B. Latshaw filed seven exceptions. The first relates to the want of necessity for the road. There is no testimony to sustain this exception. Its merits can be considered hereafter, as a petition for review is pending.

There is no merit in the second exception. It does not clearly appear that there is a borough plot of streets adopted by the proper authorities; but if such authorized plot exists, it has been changed from time to time. The almost imperceptible angle of five degrees made by the jury makes the proposed street conform with its parallel neighbor. The borough makes no objection to this deflection in the street. The jury heard both parties on this question, Springer and his adherents on the one side and Latshaw and his advocates on the other side, and we are not prepared to say that the jury committed error in their report. On a review the exceptant may be more successful.

There is no evidence to support the third exception. If the jury failed to note the improvements along the line of the proposed road, this is a matter of clerical correction by a reference back to the jury.

The fourth and fifth exceptions can be considered together, as each relates to the alleged excessive fees paid the jurors. The jurors passed upon two distinct streets and served two days; they charged \$12 each. No doubt this was an excessive charge. It was voluntarily paid by the petitioners; at least one of the petitioners paid over the money without any apparent objection. Mr. Springer paid the money—he was interested in the proceedings; but the money was not paid until the *jury had announced its conclusions*. This was a fact admitted upon the argument and is also to be inferred from the depositions. While the charge may have been excessive we fail to see why this should vitiate the report. Paying more than legal fees

Vol. VI.—5.

Kennedy's Estate.

is bad practice, and we condemn it. If the matter were brought before us in such a shape that we could reach it, we should be quick to act. Jurors who are guilty of knowingly taking illegal fees will not be afforded a second opportunity to do the act if we can prevent it.

The sixth and seventh exceptions raise a question of fact passed upon by the jury; we can not say that the jury committed an error. Upon a review the exceptants may convince the jurors that there was error in the judgment of the original jury.

For the reasons now reduced to writing the exceptions were on the 8th day of May, 1889, dismissed and the report confirmed.

Orphans' Court of Montgomery County.

ESTATE OF JOHN KENNEDY, DEC'D.

A widow can not have real estate appraised to her under the act of 27th November, 1865, where it exceeds \$600 in value.

Where the property consists of several tracts it should appear that it can not be divided "without prejudice or spoiling the whole"; and there must be an election on the part of the widow either to accept or refuse the appraisement. An election either "to retain the real estate or \$300 out of the proceeds thereof if the same shall be sold for the payment of debts of decedent" not approved.

EXCEPTIONS to widow's appraisement.

Henry Freedley and A. Edwin Longaker, Esqs., for exceptions.

Larzelere & Gibson, Esqs., contra, for widow.

Opinion of the court by WEAND, J., October 7, 1889.

The decedent died seized of certain real estate, consisting of a dwelling-house and at least nine lots of land. Lots 224, 225, 226 and 227 were purchased of Robert Griffith, and are described together. Lots 228 to 231 inclusive were purchased of Thos. Feeny,

Kennedy's Estate.

and are described together. The lot on which the dwelling house is situate is described separately. The last mentioned lot and those purchased from Griffith are subject to a mortgage of \$600. The whole property was appraised to the widow at \$150, subject to the said mortgage debt of \$600.

Several exceptions have been filed to the appraisement, but it is only necessary to consider one of them. The act of 27th November, 1865, Sec. 1, P. L. 1227, which allows real estate thus to be taken, expressly provides that when "the real estate shall consist of a single messuage or tenement, lot of ground, or other real estate which can not be divided without prejudice or spoiling the whole, and the appraisers may have appraised or shall appraise and value the same at any sum not exceeding six hundred dollars," the same may be set apart, etc., "conditioned, however, that the person or persons in whose behalf the claim is made shall pay the amount of the valuation or appraisement in excess of the three hundred dollars," etc. The appraisers say, "We value and appraise the whole of said real estate taken together, subject to said mortgage, at the sum of one hundred and fifty dollars," thus clearly indicating that it was worth at least \$750, else the equity could not be \$150 above the mortgage. The aim of the act was to provide a home for the decedent's family, and by limiting the value of the real estate to be taken it afforded them an opportunity of retaining a dwelling-house or other real estate which they could pay for by thrift and frugality. It might reasonably be supposed that on a property of the clear value of six hundred dollars a loan could be made for one-half its value, and thus serve as an inducement to save and accumulate enough to clear the property. But if we can set apart property subject to a \$600 mortgage, why not also one covered with \$10,000? This would be folly, and only end in the whole being swept away by the creditors. The object of the act was not to encourage speculation or extravagance, and we think its full object will be preserved by a strict construction of its terms.

It is clear, therefore, that the appraisement was not in accordance with law, as the appraised property exceeded the amount specified in the act.

But as this property consists of several tracts it should also appear that it could not "be divided without prejudice or spoiling the whole," and this the appraisers have failed to find as a fact. The act

Kennedy's Estate.

speaks of a single messuage, tenement, or lot of ground, or *other* real estate, clearly indicating the intention to confine the claim to one messuage or lot, or where several are included in one tract that it can not be divided. In this case, where nine lots are appraised, the directions of the act should have been followed. The act further provides that if the widow or children interested in said real estate refuse to take the same at such appraisement, an order of sale shall issue; and if so sold, then the sum of \$300 of the purchase money shall be paid to them. This then requires an election on their part either to take or refuse, and they must do one or the other.

In the analagous case of a debtor's exemption it was held that he can not claim the proceeds of a Sheriff's sale of his personal property. He is confined to an election of the goods he desires to retain: *Hammer vs. Freeze*, 19 Penna. St. R., 255.

In this case the election is in the alternative, either to retain the real estate "*or* \$300 out of the proceeds thereof if the same shall be sold for the payment of debts of decedent." If properly appraised to her it could not be sold for decedent's debts; and how is the court to confirm such an election when we have no means of knowing whether or not any such sale will ever take place? Besides, we have only the power to confirm an election or refusal; and this is neither.

And now, October 7, 1889, the appraisement is set aside.

Court of Common Pleas of Montgomery County.

AARON D. WAGNER VS. SAMUEL POLEY AND HENRY WISMER, SUPERVISORS OF UPPER PROVIDENCE TOWNSHIP.

A preliminary injunction can not be awarded where every allegation of the complainant calling for relief is denied by the defendant.

Supervisors are authorized in the exercise of their discretion to change the course of a running brook if demanded by the public convenience, and they are to decide both upon the need of such work and upon the mode of doing it.

MOTION for a preliminary injunction.

Hallman & Place, Esqs., for complainant.

Chas. Hunsicker, Esq., for defendants.

Opinion of the court by SWARTZ, P. J., January 30, 1890.

An opening order for a new road was placed in the hands of the supervisor of Upper Providence township. A small stream enters this located highway and flows along its side within the road limits for seventy feet or more, and then crosses the road. This small stream or water-course has its source in a spring not far from the highway. The supervisors commenced the erection of a culvert at the point where the stream first meets this new road. They propose to conduct the water across the roadway at this point, carry it over the complainant's land, and thereby discharge it into a tail-race about twenty feet distant from the point of its present discharge into the same race. A pipe runs from complainant's creamery to the stream, tapping it at a point beyond where the water-course now crosses this new highway. The water is conducted by gravity through this pipe to the creamery. The complainant alleges that the proposed action of the supervisors will prevent him from supplying his creamery with water from this stream. He also contends that discharging the stream into the tail-race as now proposed will fill the race with dirt and injure his mill property.

The affidavits filed on behalf of the bill set forth that the diversion of the water-course is unnecessary, and will work irreparable damage to the complainant.

The defendants deny these allegations *in toto*, and are sustained by the affidavits of others, one of whom is a surveyor, who testifies from measurements made on the ground. These affidavits set forth

that it is necessary to construct this culvert; that without it and the change of the water-course no public road can be properly opened and maintained; that carrying the water across the road at the culvert will not in any way injure the complainant's property, but will give him the same use of the stream that he now enjoys; that the proposed discharge of the stream into the tail-race will not injure the race except as heretofore.

If this road can not be properly opened and maintained for public use with the water-course running along and within its road-bed, we see no reason why the supervisors should not make provision to carry the water from the roadway. If it was necessary to divert the water-course in order to maintain a public road, it is but fair to infer that the jury contemplated such change when the land was condemned to public use.

The act of Assembly of June 13, 1836, Sec. 32, provides that supervisors shall have power and authority to enter upon any lands or enclosures, and cut, open, maintain and repair all such drains or ditches through the same as they shall judge necessary to convey the water from the public roads.

The case of Warful vs. Cochran, 34 Penna. St. R., 381, shows very clearly that we have no right to interfere at this time with these supervisors. It was there decided that supervisors have power in the exercise of their discretion to change the course of a running brook if demanded by the public convenience, and that they are to decide both upon the need of such work and upon the mode of doing it. It was further held that it is not clear that in any case their action should be controlled by injunction where they have authority to act.

Even if the complainant is entitled to an injunction upon a final hearing, we fail to see how a preliminary injunction can be awarded at this stage of the proceedings. Every allegation of the complainant that calls for an injunction is denied. The facts are in dispute. "A preliminary injunction is emphatically the strong arm of the law, and is never awarded except in a clear case of right and where no doubt exists as to the claim of the plaintiff to the remedy he invokes": Minnig's Appeal, 82 Penna. St. R., 376.

And now, January 30, 1890, the rule to show cause why a preliminary injunction should not be awarded is discharged and the injunction is refused.

JOHN WOOD, JR., VS. TRADESMEN'S NATIONAL BANK OF
CONSHOHOCKEN.

By false representations, A, a cashier of a national bank, procured from B his check for \$4,200, not to be used. A charged the amount to B's account on the books of the bank, and then returned the check to A. Two hundred dollars of the amount was placed to A's credit, on which he drew \$30. The balance, \$4,170, remained in bank and was not otherwise appropriated. *Held*, that B could recover the amount less the \$30.

The true ownership of a deposit may be shown, and where one fraudulently obtains the money of another and deposits it in his own name, the true owner may claim the fund as against the depositor or his creditors.

MOTION for judgment.

Charles Hunsicker, Esq., for plaintiff.

Childs & Evans, Esqs., for defendant.

Opinion of the court by WEAND, J., February 3, 1890.

We have no doubt that if the check to Cresson had been by him endorsed and passed to an innocent holder for value, and been paid by the bank on which it was drawn, without notice of the fraud, that Wood could not recover against the bank. And we think this would also be the law had the check been left with the bank by Cresson and the amount taken from the funds of the bank. But from the affidavit of defence there was neither an endorsement of the check by the payee, nor did the bank part with the control of any portion of the sum named in the check, except that \$200 was passed to the credit of Cresson, on which he drew \$30.

The mere charge against Wood has therefore in no way prejudiced or injured the defendant except as to the \$30. It is precisely as though they had discovered the fraud, or had notice thereof, before actually paying out the money to the payee of the check, and had then refused payment; and this could have been done even had credit for the entire sum been given to Cresson, the rights of no other person having intervened and the bank not having appropriated Cresson's deposit in liquidation of his indebtedness to them. It has repeatedly been held that the true ownership of a deposit may be shown, and where one fraudulently obtains the money of another and deposits it in his own name, the true owner may claim the fund as against the depositor or his creditors.

The defendant admits that as a matter of fact Cresson perpetrated a fraud in procuring Wood's check, and that the money represented thereby, less \$30, is still at hand and under control of the bank. Although Wood was charged with the amount of the check,

Wood vs. Tradesmen's Bank.

it was not appropriated to the account of any one else except the \$200 less \$30 still standing to Cresson's credit. The principles governing the case are laid down in *Frazer vs. The Erie Bank*, 8 W. & S., 18; *Stair vs. York National Bank*, 55 Penna. St. R., 365; and *Farmers and Mechanics' National Bank vs. King*, 57 Id., 202.

In *Frazer vs. Erie Bank*, *supra*, it was ruled that "if an agent procure the note of his principal to be discounted and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, and this though the bank had no notice when the deposit was made that the money deposited did not belong to the agent."

In *Farmers and Mechanics' Bank vs. King*, *supra*, Judge Strong held that "a deposit in bank, then, does not change the property in trust funds deposited by a trustee. The depositor may become a creditor of the bank, but he holds the contract in trust as he held the money before. It is not applicable to the payment of his debts to a general creditor. And a creditor who attaches the debt due from the bank to him can be in no better condition than the depositor."

We have here the simple proposition that, by the fraud of Cresson, Wood's account was charged with the sum of forty-two hundred dollars and the money still under the control of the bank. Who then is the rightful owner? Not the bank, for it is but a stakeholder. It parted with nothing in return for the money represented by the check, and made no appropriation of the amount. Certainly Cresson ought not to profit by the transaction, for he could only claim through his fraudulent representations as to the use of the borrowed check. We can see no difference in principle between this case and that of *Frazer vs. The Bank*, above cited.

We think the bank must have credit for the \$30 checked out by Cresson; but as plaintiff has, in addition to that sum, enough on deposit with the \$4,200 in dispute to cover the check for the non-payment of which this suit is brought, judgment must be given for the whole amount. Interest ought not to be allowed. The defendants are but stakeholders, and plaintiff's conduct was the cause of the trouble.

- And now, February 3, 1890, judgment is directed to be entered in favor of plaintiff for the sum of four thousand five hundred dollars with costs, etc., for want of a sufficient affidavit of defence.

UNRUH, TO USE, ETC., VS. THOMAS LONGSTRETH.

The act of 14th March, 1876, P. L. 7, relating to the satisfaction of judgments, does not empower the court to direct the entry of satisfaction for the amount paid on account of the judgment.

Evidence in this case held insufficient to award an issue to determine what is still due on the judgment.

RULE to open judgment.

Opinion of the court by SWARTZ, P. J., December 2, 1889.

There is no allegation of fraud, accident or mistake in the execution of the warrant of attorney. The rule to open judgment was therefore improvidently granted.

The defendant does not aver that the debt secured by the bond and warrant is fully paid, and hence we can not treat the application as a prayer for satisfaction under the act of 14th March, 1876. All that is alleged in the application, and supported by the depositions, is a dispute between the parties as to the amount still due upon the judgment confessed under the warrant of attorney.

We shall consider the application as a prayer for an issue to determine what is still due upon the judgment.

We can not disturb the judgment obtained upon the mortgage accompanying the bond and warrant. This judgment was secured in Philadelphia city and county.

There is no evidence of payments on account since the Sheriff's sale; at least, no such testimony as would justify us in submitting the question of payments to a jury.

The one hundred and forty-one dollars were paid to plaintiff February 21, 1888, and the Sheriff's sale did not take place before August 8, 1888. The judgment on the mortgage was entered on or about April 21, 1888.

We fail to see how the plaintiff can sustain his claim that the taxes paid should be recovered upon his judgment. The prior owner of the mortgage receipted to the Sheriff for the sum of \$902.12, and this sum must be credited upon the judgment. The evidence does not sustain his position that the land was to be held as security for the repayment of the taxes advanced.

The allegation that the mortgagee purchased the property at Sheriff's sale to hold in trust for the defendant is not sustained.

Cain vs. Cain.

If the plaintiff will not, within ten days from this date, file of record a paper disclaiming any right to recover under said judgment the sum of \$80.39 for taxes which he claims to have advanced and paid, an issue will be awarded to determine what amount is still due upon said judgment. Upon the filing of such paper the rule granted in this case will be discharged.

CAIN VS. CAIN.

In a proceeding for divorce the mere declarations of the libellant, in the absence of any corroborating circumstances, and made at a time so far distant from the occurrence as not to be a part of the *res gestae*, are not admissible.

DIVORCE. MOTION for new trial. 104. June T., 1888.

Webster A. Melcher, Esq., for motion.

Bickel & Hobson and *James M. Walker, Esqs.*, contra.

Opinion of the court by WEAND, J., October 7, 1889.

Thirty-six reasons in support of this motion are assigned. They may for convenience be divided into four classes: 1st. Those relating to exclusion or admission of testimony. 2d. To the charge of the court. 3d. To the answers to points. 4. To the verdict of the jury. We will consider them by classes.

The wife left the husband in November, 1885. On April 12, 1886, he wrote her a letter in relation to some money due Dr. Martin. The letter had no possible relation to the subject matter and could have no bearing on the case. (First reason.)

After Mrs. Cain left her husband she went to live with Henry Morris, who upon examination (p. 35) said: "I know nothing of any ill treatment of Sarah Cain by John Cain during their married life to my own knowledge. I never saw the condition of Mrs. Cain's body or any part of her that was not normal."

He was then asked: 1st. "Was anything said by her at that time in regard to ill treatment, her husband not being present?"

2d. "When she came to your house in 1885 did she complain of any ill treatment on the part of her husband John?"

3d. "When she came to your house in November, 1885, did she say anything in regard to ill treatment of her by her husband as being the cause which brought her down there?"

Cain vs. Cain.

Objection being made the questions were overruled.

It will be noticed that the last act of ill treatment complained of was when he kicked her on the leg a few months before she left him, in the summer of 1885. She came to Morris in November. She showed no marks or evidence of ill treatment, and under these circumstances her declarations were not evidence. Otherwise the mere declaration of a party, in the absence of any corroborating circumstances and at a time so far distant from the occurrence as not to render them part of the *res gestae*, might make out a case which the other party could not possibly rebut. This was not the case of a wife driven from her husband's home and showing the evidences of ill treatment by wounds, marks or evidences of suffering and sorrow, and in this respect the case is distinguished from *Cattison vs. Cattison*, 22 Penna. St. R., 275.

The witnesses, Lee D. Triol, Josephine Triol, Mary Ann Young, Delinda A. Pickell, were examined as to declarations made to them by the plaintiff in 1884, in relation to her husband's conduct. This was a year before she left him. The testimony was rejected as not being part of the *res gestae*. Most of the acts complained of were not denied by the husband, but he endeavored to explain them to the jury. The effect of allowing such testimony to go to the jury would be in the highest degree injurious to the sanctity of the marriage relation. Either party by exaggerating family disputes and exhibiting marks self inflicted, or otherwise, could easily in time make out a case against the other, and thus family disputes easily explained at the time, or of no importance when taken alone, could be magnified into evidences of cruelty. We do not believe that the law sanctions such course of conduct, especially where both parties are witnesses.

In the charge of the court and answers to points the court was careful to distinguish the different causes which would justify the jury in finding for plaintiff, and the law was carefully laid down as applicable to each cause. The law as thus given to the jury is sustained by the decisions of the Supreme Court in the cases of *May vs. May*, 62 Penna. St. R., 206; *Nye's Appeal*, 24 W. N. C., 121; and *Richards vs. Richards*, 37 Penna. St. R., 225.

The whole case was, we think, properly presented to the jury, who were the judges of the facts. We have no fault to find with their verdict, and must refuse a new trial.

And now, October 7, 1889, motion for a new trial overruled.

BRADLEY VS. RITCHIE.

An appeal can not be entered *nunc pro tunc* where the neglect to file it in proper time was caused by statements of the justice upon which the defendant had no right to rely. Defendant received a transcript, but was told by the justice that he had to make a return to court and that she had nothing more to do. *Held*, that this did not excuse the defendant, as the neglect was her own, and not official in the justice.

RULE to enter an appeal *nunc pro tunc*.

H. B. Dickinson, Esq., for plaintiff.

Geo. W. Rogers, Esq., for defendant.

Opinion of the court by WEAND, J., October 7, 1889.

After judgment was rendered by the justice the defendant appealed. She received a transcript but did not enter it within the time allowed by the act of Assembly. Her excuse for this neglect is that the justice told her he had to make a return to court and she had nothing more to do. Defendant had no right to rely upon the promise or assertion of the justice. She was bound to know the law in this respect. She had a transcript which she could have filed.

The case is ruled by *Wilson vs. Hathaway*, 8 Phila., 235; *Houk vs. Knoff*, 2 Watts, 72; and *Sherwood vs. McKinney*, 5 Wharton, 435, which decide that neglect of this kind is that of the party, and not official in the justice, and that therefore the appellant is not entitled to relief.

And now, October 7, 1889, the motion to enter the appeal *nunc pro tunc* is overruled.

Supreme Court of Pennsylvania.

SHANNON, COMMITTEE OF DALFONZO, VS. NEWTON.

A judgment of record at the defendant's death, although not then a lien on his land, is not a debt whose lien is limited to five years from the decedent's death, unless suit be brought according to Sec. 24, act of February 24, 1834.

An executrix, who is also devisee, is bound by a judgment of revival obtained on a sci. fa. sur judgment, although the writ be only issued against her as executrix.

The proper practice on a judgment obtained against a decedent in his life-time is to issue the sci. fa. against his representatives.

The act of June 1, 1887, P. L. 289, does not apply where the judgment sought to be obtained is not against a defendant or terre tenant. A devisee is not a terre tenant within the meaning of the act.

A judgment by default for want of an appearance was entered against an executrix, and a Sheriff's sale had on the judgment and ven. ex. February 23, 1888. The deed was acknowledged March 24, 1888. A petition in lunacy was filed May 8, 1888, and by the report of the commission filed May 23, 1888, it was found that the executrix was a lunatic, and had been such for four or five years previously, without lucid intervals. *Held*, not to invalidate the sale, and that the purchaser was protected by the act of 1705.

ERROR to the Court of Common Pleas of Montgomery county.

The facts as developed in the court below, as well as the opinion of WEAND, J., is found reported in 5 MONTGOMERY COUNTY LAW REPORTER, 167.

G. R. Fox & Son, Esqs., for plaintiff in error.

William F. Solly, Esq., for defendant in error.

Opinion of the Supreme Court delivered February 17, 1890. ▲

PER CURIAM.—The defendant (appellee) being a bona fide purchaser at Sheriff's sale of the premises involved in this controversy, is protected by the act of 1705 provided the judgment under which the property was sold warranted the execution. This act was passed to protect the title of purchasers, and has been repeatedly held a complete protection against every defect or irregularity, except when the judgment was void on its face: *Springer vs. Brown*, 9 Penna. St. R., 305; *Evans vs. Meylert*, 19 Id., 402; *Duff vs. Wynkoop*, 74 Id., 300. The defendant's title could not, therefore, be affected by the

Vol. VI.—8.

Shannon, Committee, etc., vs. Newton.

fact that some months after the judgment on the sci. fa. the plaintiff, Mary Dalfonzo, who was devisee of the property under her husband's will, was declared a lunatic, and that said lunacy related back to a period anterior to the judgment. This was a fact which did not appear upon the record of the judgment, and of which the defendant had no notice at the time he purchased at the Sheriff's sale. The plaintiff claimed, however, that the lien of the judgment had expired prior to the issuing of the sci. fa., that the lien was lost, and the revival proceedings were a nullity. If the plaintiff had been a terre tenant there would have been force in this contention. She was a devisee, however, and an heir or devisee is a mere volunteer and takes but what there is left of his ancestor's or testator's estate after the debts are paid. He is not a terre tenant: *Horner vs. Hasbrouck*, 41 Penna. St. R., 169; and a judgment against a decedent in his life-time remains a lien against his heirs and devisees without revival: *Brown's Appeal*, 91 Penna. St. R., 485; *McCahan vs. Elliott*, 103 Id., 634. This was admitted to be the law prior to the passage of the act of June 1, 1887, P. L. 289. It was contended, however, that this act changed the law in this respect, and that a judgment ceases to be a lien against the real estate of the debtor or his heirs and devisees unless revived within five years. In other words, the defendant in the judgment, his heirs and devisees, are protected precisely as all purchasers, mortgagees, and other lien creditors. We see nothing in the act to give it the effect claimed for it, and we feel quite sure the Legislature would not have made so sweeping a change as this in the law without expressing such intention in the clearest language. The act deals with terre tenants. We have already seen that Mrs. Dalfonzo does not occupy that position.

Judgment affirmed.

ALLEBACH VS. HUNSICKER.

A, the owner of a farm, divided it into lots and sold the same under a lottery scheme. He gave deeds to the several parties drawing lots. Subsequently he brought ejectment to recover the lots back, alleging that the deeds were void under the act of March 31, 1860. *Held*, there could be no recovery.

A man can not set up his own turpitude to defeat his own deed.

ERROR to the Court of Common Pleas of Montgomery county.

In the court below, before WEAND, J., plaintiff proved title in himself and rested. Defendant offered deeds for premises in question given by plaintiff, and rested. Plaintiff was then called in rebuttal, and offered to prove that "on the 25th of October, 1875, and subsequently, the witness and others, including the defendant, went into a scheme by which they and the plaintiff were to put up the Rahn farm into a lottery; that for the purpose of evading the lottery laws an agreement in writing was drawn up and a certain amount of down money paid, being at the rate of \$50 for each lot in conformity with the plan of lots then prepared; that those lots were of different values, ranging in cost from \$1000 to \$50 each; that to carry out the plan they first appointed a committee on distribution, and then prepared a number of tickets, which they put into boxes; that two boys were then taken, and they drew the numbers out of a hat, one boy drawing out a number and the other drawing out a name, and the witness kept an account and put down the name of the man and the number of the lot that he drew; that some drew prizes—that is, lots more valuable than others, and some drew the less valuable properties; that after the drawing was completed deeds were prepared by the committee, signed by Mr. Allebach, and delivered in pursuance of that lottery, and that among them were these deeds, for which there was no other consideration than the lottery; that prior to the drawing no one knew which lot he would get, but each took his chances as already described."

Defendant objects on the ground that the purpose of the offer is to contradict on the part of the plaintiff his own deed.

Objection sustained and offer overruled. Plaintiff excepts. Bill sealed. This action of the court was the error assigned.

Charles Hunsicker and Henry Freedley, Esqs., for plaintiff.

Childs & Evans, Esqs., for defendant.

Opinion of the Supreme Court delivered February 17, 1890, by

PAXSON, C. J.—This was an attempt by the plaintiff to set up his own turpidity to defeat his own deed. If the law sanctions this, we would be ashamed to sit here and administer it. Fortunately, it does not. The deed upon its face was a valid instrument. The plaintiff could only avoid it by offering to prove the illegal consideration, viz.: the lottery scheme, in which he was a participant and by means of which he was enabled to sell this and a number of other lots. This evidence the court below properly rejected. Granted that under the act of March 31, 1860, the deed was void, it was not so on its face; no part of this lottery transaction appeared thereon, and the plaintiff could only avoid it by showing his own share in the illegal transaction. This, under our authorities, he could not do. It was said in *Winton vs. Freeman*, 102 Penna. St. R., 366: "The books are full of cases where the party to the fraud has sought the relief of the courts from the consequences of his unlawful act. But the decisions have been uniformly adverse to such applications. It is not the province of a court to help a rogue out of his toils. The rule is to leave parties where it finds them, giving no relief and no countenance to contracts made in violation of statute," citing *Hershey vs. Weiting*, 50 Penna. St. R., 240; *Evans vs. Dravo*, 24 Id., 62. There may be some excuse in some instances for men in seeking to disentangle themselves from the web of fraud which they have spun around them, but for this plaintiff there is none. He sells this property by means of this lottery scheme; he receives the money and executes a deed; he retains the money, and now seeks to recover the property back upon the allegation that the deed is void under the act of 1860. It is seldom we meet with a claim so unblushing and conscienceless as this. The learned Judge below was right in rejecting his offer of evidence, and to this extent keeping him honest.

Judgment affirmed.

MARKLEY'S APPEAL.

A testator directed as follows: "I give, devise and bequeath unto my wife all my property and effects, real, personal and mixed, of whatsoever nature and kind, for and during her natural life. Item—It is my will, and I hereby order and direct that at the death of my wife, all the residue of said property, real, personal and mixed, shall go to my children, A, B and C, and to their heirs, in equal shares absolutely." *Held*, that the widow took a life estate in the personalty, with power to consume the same; and the bequest over to the children applied only to such personal property as might remain unconsumed after death.

APPEAL from the Orphans' Court of Montgomery county.

The facts of this case are fully disclosed in the opinion of the court below as delivered by SWARTZ, P. J., and will be found fully reported in 5 MONTGOMERY COUNTY LAW REPORTER, 93.

Charles Hunsicker, Esq., for appellant.

Larzelere & Gibson, Esqs., for appellee.

Opinion of the Supreme Court delivered February 17, 1890.

PER CURIAM.—We are of opinion that the learned court below disposed of the case upon correct principles. Under the will of Christopher Markley the widow took the personal estate absolutely; that is to say, she had the right to use so much of it as was necessary for her comfort and support. It was only the residue thereof that was to go to testator's children after her death. The only matter that leaves any doubt upon the question was the manner in which the real and personal estate were blended by the will. But in view of the fact that a considerable portion of the personal property consisted of crops, stock on the farm, and farming implements, the mere use of which necessarily inferred their consumption and destruction, and that the testator made no distinction between this character of property and money at interest, we are led to the conclusion that he intended his wife to take the whole personal estate absolutely if it was needed for her support. It appears to have been needed, and as his widow was the first object of the testator's bounty it was a natural provision for him to make. We think this view is fully sustained by the authorities referred to by the learned Judge below in his opinion.

The decree is affirmed and the appeal is dismissed
at the cost of the appellant.

DEARBORN VS. RAYSOR.

Where the owner of personal property transferred the possession to the vendee, reserving to himself the naked title solely for the purpose of securing the payment of the price agreed upon, the contract is a conditional sale.

A sale, followed by delivery of possession, with a provision to convert the sale into a bailment, if the price of the article is not paid as agreed upon, is a conditional sale. The provision is not sufficient to convert the contract into a bailment *ab initio*.

Held, that under the foregoing tests, the contract in evidence is a conditional sale.

ERROR to Quarter Sessions of Montgomery County.

The opinion of the court below by SWARTZ, P. J., will be found in full in 5 MONTGOMERY COUNTY LAW REPORTER, 204.

Jacob V. Gotwalts and *Wm. F. Dannehower, Esqs.*, for plaintiff.
Larzelere & Gibson, Esqs., for defendant.

The opinion of the Supreme Court delivered February 5, 1890.

Per CURIAM.—Judgment affirmed.

Court of Common Pleas of Montgomery County.

HENRY HERMANN VS. THE PHILADELPHIA LUMBER CO.

Goods are subject to the right of stoppage in transitu after their arrival at the place of destination while in the hands of a carrier for the mere purpose of delivery to the vendee, where the consignor discovers the insolvency of the vendee.

A fraudulent assignee of the bill of lading has no rights superior to those of his assignor. Facts in this case held sufficient to submit to the jury the question whether there was not a fraudulent transfer and acceptance of the bill of lading for the purpose of defeating plaintiff's right of stoppage in transitu.

SUR MOTION for a new trial.

Irving P. Wanger, Esq., for plaintiff.

Alex. Cutler and *N. H. Larzelere, Esqs.*, for defendant (for rule).

Opinion of the court by SWARTZ, P. J., November 11, 1889.

As between the plaintiff, the consignor, and Cresson, the consignee, the transitus in this case was not ended when the notice of stoppage was given.

Hermann vs. Lumber Co.

The lumber was consigned to Norristown. It reached Bridgeport, a town opposite Norristown, on August 27, 1886, and on that day the Sheriff levied upon it. With the levy still pending the car was moved to Norristown on August 30th, and on the following day notice of stoppage was served on the railroad company. The Sheriff's levy continued to September 1st. Cresson had no lumber-yard in Norristown. This was not the case of a consignee interested in a railroad siding upon which the company delivered the car. Neither the consignee nor any one for him appeared to accept a delivery. Goods are subject to the right of stoppage in transitu after their arrival at the place of destination while in the hands of a carrier for the mere purpose of delivery to the vendee: *Lickbarrow vs. Mason*, 1 *Smith's Leading Cases*, part 2, p. 1159; *Mattram vs. Heiger*, 5 *Denio*, 629; *Harris vs. Hart*, 6 *Duer*, 606; *Harris vs. Pratt*, 17 *N. Y.*, 249; *Mohr vs. Railway Co.*, 106 *Mass.*, 67; *Donath vs. Brownhead*, 7 *Penna. St. R.*, 303; *Pottinger vs. Hecksher*, 2 *Grant*, 309.

The lumber was in the custody of the Sheriff when the notice of stoppage was given; but even without this factor in the case we see no error in our instruction to the jury that the transitus was not terminated.

If it was not determined as to Cresson, the consignee, then it was not ended as to a fraudulent assignee of the bill of lading. The assignee, with knowledge of the fraud, had no rights superior to those of his assignor.

Evidence of frauds of a similar nature perpetrated by the same persons is admissible on the question of intent: *Neff vs. Landis*, 110 *Penna. St. R.*, 204; *Mackinley vs. M'Gregor*, 3 *Whar.*, 396.

The evidence upon this point was but a circumstance to be taken into consideration with the other facts in the case offered to show fraud and a knowledge of fraud. For an insolvent man to buy lumber at a high figure, sell it before its arrival at a much lower figure, and then fail to pay for it at all, is evidence of fraud when taken in connection with the fact that this is but one of a series of similar transactions; and all persons knowingly participating in such a scheme are guilty of fraud. We cautioned the jury as to the weight to be given to their evidence. We fail to see how the defendant was injured by our instructions.

The only other exception that we shall consider is the refusal to direct the jury to find a verdict for the defendant. There was suf-

ficient evidence to submit the case to the jury upon the question whether there was not a fraudulent transfer and acceptance of the bill of lading for the purpose of defeating plaintiff's right of stoppage in transitu.

The plaintiff's failure to answer the inquiry as to Cresson's credit; his knowledge of Cresson's insolvency; his purchase of the very goods before their arrival, concerning which the inquiry as to credit had been made; the failure to account for the payment—that is, how he paid for them or whether he paid anything over the seventy-five dollars; the payment of money to Cresson when Cresson owed money to defendant at the time, and this too before any bill of lading was produced; the production of the receipt for \$25, designating the number of the car in which the lumber was shipped, when the evidence fails to disclose how either party could have known the number of the car at that time (on this very day Cresson addressed a note to plaintiff, indicating that he had no knowledge even of the shipment), and the defendant testified that upon that day he did not know where the lumber came from; the circumstances under which the bill of lading was purchased; the defendant's manner upon the stand; his failure to remember the party with whom he had a suit in court and against whom he appeared as a witness less than three weeks before; his knowledge of Cresson and prior dealings with him,—these are some of the facts and circumstances relied upon by the plaintiff to show fraud, and when taken together we could not say to the jury that there was no evidence of fraud.

We have no doubt that the defendant's manner and conduct on the stand were strong arguments against him before the jury. We fail to see how they could have had any other effect. Upon a careful examination of the proceedings we find no good reason for granting a new trial. We are entirely satisfied with the verdict.

And now, November 11, 1889, the motion and reasons for a new trial are dismissed.

Court of Quarter Sessions of Montgomery County.

IN RE WIDENING OF EAST AVENUE IN THE BOROUGH OF JENKINTOWN.

The act approved May 8, 1889, entitled "An act fixing the number of road and bridge viewers," is not unconstitutional by reason of its proviso: "This act shall not apply to counties having local acts inconsistent herewith." This proviso does no more than hold in abeyance the general law where there is a local law, and upon the repeal of such local law the county is subject to the operation of the general law. This is not local legislation.

The surveyor appointed under this act as a viewer does not supply the place of the surveyor who is to be furnished by the petitioners under Section 58 of the general road law of 13th June, 1836.

The Court of Quarter Sessions has no powers in road cases, except such as are conferred by statute. The act of May 8, 1889, makes no provision for the appointment of three viewers *to widen* a street or road, and the court has no authority to appoint three viewers under this act for the purpose of widening a street.

EXCEPTIONS to the report of viewers.

B. E. Chain, Esq., for exceptions.

James B. Holland, Esq., for petition.

The opinion of the court was delivered March 3, 1890, by SWARTZ, P. J.

Three viewers were appointed under the recent act of Assembly, approved the 8th day of May, 1889. They reported in favor of widening the street. We are now asked to set aside this return for the following reasons:

1. Because the draft was not prepared by the surveyor, who was one of the viewers.

2. Because the act of May 8, 1889, is special legislation, and therefore unconstitutional.

3. Because the act, even if constitutional, makes no provision for the appointment of jurors *to widen* a street or road.

We shall consider the objections in their order.

The act of 13th June, 1836, Section 58, provides, "that in all cases of a view or review or any view subsequent to a review of a road, a surveyor shall be found and paid by the persons applying for such view," and by the act of 8th May, 1850, Section 8, the widening of a road is subject to the rules and restrictions regulating proceedings to lay out and vacate public roads. There is nothing in the act of May 8, 1889, which relieves the petitioners from the duty of providing and paying a surveyor; nor does this act impose any

East Avenue, Jenkintown.

duties upon the surveyor appointed by the court, except such as may devolve upon him as a viewer. The act is entitled, "An act fixing the number of road and bridge viewers." It proposes to change the law so far as it relates to the *number* of views, without any intimation that their duties are changed. The act does not repeal, either directly or by implication, the provision directing the petitioners to furnish a surveyor; nor is there any provision in the new act inconsistent with the requirements of the prior act. Implied repeals are not favored. If two statutes can stand together the posterior does not abrogate the prior: *Erie vs. Bootz*, 72 Penna., 196. If one of the viewers has the qualifications of a surveyor, this, no doubt, will enable the jury to discharge its duties more intelligently.

Does the act offend against the Constitution as a special or local law?

Article III, Section 7, of the Constitution, provides that "the General Assembly shall not pass any local or special law authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys."

It is claimed that the act in question is local or special because of its proviso, "this act shall not apply to counties having local acts inconsistent herewith."

The clearly expressed intent of this proviso is no more than to save the local laws in force inconsistent with the new enactment. If this exception had been omitted the force and effect of the statute would certainly have been the same: *Malloy vs. Rinehard*, 115 Penna., 25. Rarely, if ever, does a case arise when it can justly be held that a general statute repeals a local statute by mere implication: *Evans vs. Phillipi*, 117 Penna., 226.

If the proviso stated, "this act shall not apply at any time to counties now having local laws inconsistent herewith," the exceptant's contention would have to be sustained. But this is not the meaning of the exception. The general law is held in abeyance where there is a local law, but upon the repeal of such local law the county is subject to the operation of the general law. This is the construction that we give to the proviso. The construction is consistent with the language used. That the repeal of a local law has such effect as to an existing general law is shown in *Durr vs. Commonwealth*, 11 Cent., 181.

East Avenue, Jenkintown.

This proviso is unlike those which exclude certain counties from the operation of an act, and in which the act can not become operative, generally, without a re-enactment. In the one case, the purpose is to exclude territory; in the other, to protect local laws. We can not distinguish the proviso before us from that found in the tax law of 1885. It was there held that the provision, "but this act shall not apply to any taxes the collection of which is regulated by a local law," did not render the act unconstitutional: *Evans vs. Phillipi, supra*. In the proviso under consideration the legislative intent was manifestly the same as that in the tax law. The presumptions are in favor of the constitutionality of an act of Assembly: *Craig vs. First Church*, 88 Penna., 42. Nothing but a clear violation of the Constitution will justify the courts in pronouncing an act of the Legislature unconstitutional: *Speer vs. School Directors*, 50 Penna., 150; *Hilbish vs. Catherman*, 64 Penna., 154; *Penna. R. R. vs. Riblet*, 66 Penna., 164.

We are of the opinion that, without doing violence to the language used in the exception, we can interpret it as meaning no more than a saving of the local laws until their repeal; hence we are bound to give it that construction.

Is the act broad enough to include a proceeding to widen a street or road?

The act includes "all proceedings to lay out or vacate a public or private road or to assess damages as provided by law, to fix the site for a county bridge and to accept the same when repaired or completed according to existing laws." The act is careful to specify the proceedings in which three viewers may be appointed. It fails to specify the widening of a road or street as one of these proceedings. Unless the proceeding to lay out a public or private road includes the widening of the same, there would seem to be no authority for the appointment of three viewers to widen a street.

The general road law of 13th June, 1836, made no provision for the widening of a road. The act of 8th May, 1850, was passed to authorize the court to appoint viewers for this purpose. The act of 1850 did not amend the act of 1836, so that the authority *to lay out* should include the authority *to widen*. The jurisdiction to widen roads is special: *Reserve Township Road*, 80 Penna., 165. The opening of a street and the widening of a street are recognized in the legislation of the commonwealth as separate and distinct acts:

East Avenue, Jenkintown.

In re Powelton Avenue, 11 Phila., 447. That the authority to appoint a jury to lay out a road does not include the power to direct a jury to widen was decided In re Liberty Alley, 8 Penna., 381. This decision was based upon the ground that the Quarter Sessions had no powers in road cases other than those clearly given by statute.

If under the act of 1836 the court could not entertain a petition to widen because the act only provided for proceedings to lay out and open, how can the act now in question give us authority to appoint a jury of three men to view and widen when it fails to make any provision for such jury, unless it is included in the words "to lay out a road?"

It is true we may fail to find any good reason why three viewers should lay out a road and six be necessary to widen such road. But this is not the question before us. What powers does the act confer upon the court, is the inquiry.

The language is plain and unambiguous, and there is no room to interpolate the supposed intention of the legislators. In *City of Pittsburg vs. Kalchthaler*, 114 Penna. St. R., 547, the court said: "It is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments, out of deference to some supposed intent or absence of intent which would prevent the application of the words actually used to a given subject"; and the converse of the proposition is equally true, that it is unsafe to give words an interpretation apart from their literal meaning, out of deference to some supposed intent. This exception is fatal to the proceeding.

It is with some reluctance that we come to this conclusion, and yet we can not say that we approve of this proceeding to widen and assess damages. The act of 22d April, 1856, provides a method for widening streets in boroughs and assessing damages. This method gives to the borough authorities, under certain restrictions, the right to widen, and it seems to us that such a proceeding is calculated to answer the best interests of the municipality. The damages will then be assessed by seven disinterested freeholders of the borough, and usually they are more competent to discharge such a duty than the strangers to whom the duty would be otherwise assigned.

And now, March 3, 1890, for the reasons given in this opinion, the report of viewers is set aside.

Supreme Court of Pennsylvania.

THE NORRISTOWN TITLE, TRUST AND SAFE DEPOSIT CO. VS. THE
JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

The act of May 11, 1881, P. L. 20, providing that policies of insurance "shall contain, or have attached to said policies, correct copies of the application as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, etc., shall be received in evidence in any controversy between the parties to or interested in the said policy," etc., was intended to impose a duty upon insurance companies and to protect the insured. A failure to comply with the terms of the act is therefore an omission, which can not be taken advantage of by an insurance company.

In an action upon a life insurance policy it is no objection to the admission of the policy in evidence that the beneficiary is not named therein, and that therefore there is nothing upon its face to show that the plaintiff is entitled to recover. The policy must, however, be followed by further evidence to show who the beneficiary is, in order to enable the plaintiff to recover.

In an action upon a life insurance policy, where there was no dispute as to death, nor that the policy was in force at the time of death, it appeared that no beneficiary was named in the policy. The plaintiff offered the policy in evidence, to be followed by proof that he was the beneficiary thereunder. This evidence was admitted under objection. The plaintiff then offered in evidence the application upon which the policy issued. This evidence was objected to, on the ground that the application was not attached to the policy, as required by the act of May 11, 1881. This objection was sustained, and the evidence excluded. The plaintiff then offered to prove by parol, outside of any writing, that he was the beneficiary intended by the policy. This evidence was admitted; on writ of error: *Held*, that the best evidence, namely, the application, having been excluded at the instance of the company defendant, it could not complain of the admission of the secondary evidence as to the beneficiary.

ERROR to the Court of Common Pleas of Montgomery county.

The facts fully appear in the report of same case in the court below, reported in 5 MONTG. CO. LAW R., 83; same case, 6 Id., 17.

Gilbert R. Fox, Jr., and Edward Shippen, Esqs., for appellant.

E. F. Slough and F. G. Hobson, Esqs., for appellee.

The opinion of the Supreme Court was delivered February 17, 1890, by PAXSON, C. J.

This was an action brought in the court below on an insurance policy issued by the appellant company on the life of Annie Cruikshank. The beneficiary appears to have been one William Legg, a minor child, although he was not named as such in the policy. It was proved, however, that he was designated in the application as the beneficiary. It was not disputed that Annie Cruikshank was

dead; that the policy was in force at the time of her death; nor that the proper proofs of her death had been made to the company.

The case below turned upon a mere technicality: upon the sufficiency of the proof that William Legg was the beneficiary. The first assignment of error is to the admission of the policy. It was objected to upon the ground that there was nothing upon its face to show that the plaintiff was entitled to recover; the objection was overruled and the policy admitted. We see no error in this. It is true the policy did not show upon its face the right of the plaintiff to recover, and had the plaintiff stopped here his case would have failed. But the policy was one step in the cause, and it was competent to follow it up by any evidence to show who the beneficiary really was. The next step in the cause was the offer of the application, which, as before stated, contained the name of the beneficiary. This was objected to by the defendant and excluded. The record does not show for what reason, but we infer that it was because the application was not attached to the policy as required by the act of May 11, 1881, P. L. 20, which provides that policies "shall contain, or have attached to said policies, correct copies of the application as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence in any controversy between the parties to or interested in the said policy, nor shall such application or by-laws be considered a part of the policy or contract between the parties."

In the *Imperial Fire Ins. Co. vs. Dunham*, 117 Penna. St. R., 460, it was said by this court: "The application, therefore, constituted no part of the policy or of the contract between the parties, and was not received in evidence. The case is to be considered as if no such paper existed." And in *New Era Life Association vs. Musser*, 120 Id., 384, we said, referring to the act of 1881: "It is a wise and beneficent act, founded upon sound reasons of public policy; it affords protection to persons who insure their lives or property, and can injure no company conducted upon honest business principles." The act of 1881 was evidently intended to impose a duty upon insurance companies and to protect the insured. It had often happened that upon the trial of a case an insurance company would offer a by-law, or the application of the insured, in evidence for the purpose of impaling the plaintiff upon some technical point. The

Title, Trust and Safe Deposit Co. vs. Life Ins. Co.

application when made is filed with the company, and when the assured receives his policy he often puts it away and in time forgets what he had stated in his application. The act of 1881 was passed to compel the company to attach the application to the policy, and upon its failure to do so it can not be received in evidence. It will be noticed that in each of the cases cited the application was offered by the insurance company. This is the first instance to my knowledge where a company has been heard to object to the admission of the application in evidence when such offer came from the insured. To sustain such an objection on the part of the company is to allow the latter to take advantage of its own neglect in not complying with the act of 1881. We therefore think the court below erred in excluding this application. This appeal, however, is by the company, and as the point was ruled in its favor we would not have noticed it but for its relation to the ruling of the court below on the offer of evidence contained in the second assignment.

After the learned Judge had excluded the application the plaintiff offered to prove by parol that Legg was the beneficiary. This was admitted under objection and exception. The learned Judge could not well have done otherwise, after his former ruling, without turning the plaintiff out of court.

This testimony was not strictly regular, but the defendant company having objected to and excluded the best evidence can not now be heard to complain that secondary evidence was received. Upon the whole we think a correct result was reached, though not by the most direct path.

Judgment affirmed.

Court of Common Pleas of Montgomery County.

UHLENBACK ET AL. VS. KIEFER ET AL.

As a rule an attorney has no lien for fees on his clients' money brought into court for distribution.

C, an attorney who had issued execution upon judgments, by which a fund was realized, was afterwards, and before the fund was distributed, relieved and another attorney employed in his stead. C then appeared before the auditor and claimed to be allowed his reasonable fees out of the amount awarded his client. The auditor disallowed his claim, and the report was sustained by the court.

EXCEPTIONS to auditor's report. Fi. Fas. 79, 80, 81 and 82, March T., 1888.

Charles Hunsicker, Esq., for exceptant.

Childs & Evans and Larzelere & Gibson, Esqs., contra.

Opinion of the court by WEAND, J., March 3, 1890.

The fund for distribution is the proceeds of a Sheriff's sale. Mr. Corson, a member of the bar, representing certain judgment creditors, issued executions upon their judgments and realized thereby the fund in court. Before payment into court his clients revoked his authority as counsel and appointed another to represent them. Mr. Corson claimed before the auditor that he should be awarded his former clients' shares, or that his fees should be determined and awarded to him out of their shares.

It is clear that he can not receive the amounts due the execution creditors, his authority to receive the same having been revoked. An attorney has no lien upon the moneys raised upon execution in the Sheriff's hands, nor can the Sheriff pay the money to the attorney on his writ after notice of revocation: *Irwin vs. Workman*, 3 Watts, 357.

It can make no difference that the money is in court, for the rules of distribution are the same. Distribution can only be made to the liens upon the property or fund as they appear at the time of levy and sale. Has he then a lien for his fees?

This is not the case where the attorney has collected the money for his client and has it in hand, in which case he may retain his fees as a set-off and not as a lien: *Dubois' Appeal*, 38 Penna. St. R., 231; *Balsbraugh vs. Frazer*, 19 Id., 95; and it is also distin-

Tomlinson's Estate.

guished from the cases whereby the proceeding by which the fund is produced is in equity, in which cases the Chancellor in making distribution awards proper counsel fees out of the fund under the peculiar practices and powers of a court of equity: *Freeman vs. Shreve*, 86 Penna. St. R., 135; *McKelvy's Appeal*, 15 W. N. C., 564. The latter case cited in favor of this claim does not support the position taken, for there the claimant was an equitable owner of the fund by reason of the special agreement entered into between the parties. He had no other fund to look to, and he was to be paid out of that fund. As a rule, an attorney has no lien on money brought into court for distribution, even though it belong to his own client: *Dubois' Appeal*, *supra*. It may be that the attorney in this case has a good claim as against his clients, and, if possible, the court ought to protect him; but as we can not do so without violating the plain rule of law laid down in many cases, we must confirm the auditor's findings and reject the claim.

And now, March 3, 1890, exceptions dismissed and report confirmed.

Supreme Court of Pennsylvania.

ESTATE OF WELLS TOMLINSON, DEC'D.

Lead-pencil lines drawn through a legacy by the testator, when the will is written in ink, is a revocation of such legacies.

Precisely the same effect is to be given to writings in lead-pencil as to those written with ink.

Myers vs. Vanderbilt, 84 Penna. St. R., 510, followed.

Wells Tomlinson's Estate, 5 MONTG. CO. L. R., 115, overruled.

APPEAL from the Orphans' Court of Montgomery county.

The case as decided in the court below will be found reported in 5 MONTG. CO. L. R., 115.

N. D. Tyson, Esq., for appellants.

B. E. Chain and Wm. F. Solly, Esqs., for appellees.

Tomlinson's Estate.

The opinion of the Supreme Court was delivered March 17, 1890, by GREEN, J.

The reasoning and the authorities cited in the opinion of this court in the case of Myers vs. Vanderbilt, 84 Penna. St. R., 510, make it very clear that we intended to decide, and did decide, that the writing of a will in pencil is the full equivalent for writing in ink. Mr. Justice Mercur, in the course of the opinion, said: "So we think the authorities establish that a valid will may be drawn with the same materials that will suffice for the drawing of any written contract. As was well said by Mr. Justice Coulter in Hill vs. Scott, *supra*, they abundantly prove that a writing in pencil is equivalent and tantamount to a writing in ink."

We then held that a will the whole of which was written in lead-pencil was in compliance with the requirement with the wills act of April 8, 1833, that "every will shall be in writing." We are entirely satisfied with that decision, and have no disposition to change or modify it. The learned court below thought that because the cancellation was in pencil, while the will itself was in ink, the cancellation was deliberative only and not final, and he therefore overruled the auditor who held it to be final. In doing this the court followed a few English decisions, which, while agreeing that wills written in pencil are valid, yet held that where alterations were made in pencil they would be regarded, if the will was in ink, as deliberative only. It would not be difficult upon a review of those cases to show that in most, if not all of them, the decision was based as well on other facts and circumstances as on the fact of the alterations being in pencil; but we do not think it necessary to engage in such a review. We regard our ruling in Myers vs. Vanderbilt as obliterating the distinction between writings in ink and pencil, and assigning precisely the same legal effect to the instrument in either case.

If there be no distinction between these methods of writing, so far as their legal effect is concerned, we can see no reason for assigning an effect to a pencil alteration different from that which we would assign to an alteration in ink. If we do that we say they are not the same, whereas we have deliberately decided that they are the same not only in relation to wills but to other solemn instruments, as was shown in the opinion in Myers vs. Vanderbilt. We do not care to repeat the reasoning and authorities of that opinion, because we deem it entirely unnecessary. It would certainly be inconsistent to hold

Tomlinson's Estate.

that in alteration of wills pencil writing and ink writing have not the same effect, when in all other cases we say they have. As indicative of the testator's intent, the pencil alterations speak quite as certainly as if they were in ink. The will was found after the testator's death locked up in a drawer in his own room. He chose to leave it in the exact condition in which it was found. As it was found it clearly cancelled certain of the legacies. By what authority can we say that they were not cancelled when in point of fact they were? How can we say it was not the intention of the testator to make these cancellations when in reality he has made them? Do they not signify the same intent being in pencil that they would have signified in ink? We have no right to say they do not; and, that being so, they prevail alike whether in ink or pencil.

It is argued that the will was found among papers of no value, and therefore we must infer the alterations were deliberative only; but that objection would apply as well to the will itself as to the alterations. If it was found in a place of sufficiently careful custody to sustain it as a will, that custody was equally sufficient to sustain the alterations. Moreover, if sustained at all it must be only in the condition in which it was found. But the argument on this ground has no merit. The will was found locked up in a drawer in a bureau standing in the testator's room in which he lay sick and died.

The keys, one of which unlocked the drawer, were delivered by the testator shortly before his death to Mrs. Cressman, a relative and his nurse, with directions to hand them to Mr. Dutton, one of the executors, as soon as he was dead. To hold that such a custody was a careless custody, sufficient to raise even a doubt about the intention of the testator in regard to its contents, is simply impossible.

Another circumstance to which the court attached consequence was that a paper was found in the testator's box at bank which contained a list of the legatees as they were named in the will, and with all of the legacies cancelled in pencil that were so cancelled in the will except one, John Keller, whose name was cancelled but not the amount—\$500. The court thought this was proof that the testator was still vacillating (in 1883 or 1887) because John Keller's name and legacy were not cancelled in the will, and therefore that all the cancellations should be regarded as deliberative only. We can not consider this circumstance as having such a meaning. To us it is indicative rather that the paper found in the bank was probably his

Jenkins, Trustee, vs. Davis.

first or deliberative memorandum, which he made final when he made the cancellations in the will, and there he concluded to let Keller's legacy remain.

We find no other facts in the case indicating that the testator did not intend to do that which in fact he did do, and hence we are of opinion that the view of the whole subject taken by the learned auditor was the correct view, and that it was error to overrule his report.

The decree of the Orphans' Court is reversed at the cost of the appellees, and the record is remitted with instructions to redistribute the fund in accordance with the report of the auditor.

Court of Common Pleas of Montgomery County.

JENKINS, TRUSTEE, VS. DAVIS.

A judgment having been confessed to a "trustee for my creditors," it was afterward on behalf of a creditor attempted to restrict distribution to "business creditors," thereby excluding a claim on bond accompanying a mortgage. To sustain this contention it was shown that at the time the judgment was confessed it was intended to have been given only to business creditors. *Held*, that all existing creditors were entitled to participate.

EXCEPTIONS to auditor's report. Fi. Fa. 12, June T., 1886.

J. A. Strassburger, Larzelere & Gibson, J. P. Hale Jenkins and John M. Dettra, Esqs., for exceptants.

Childs & Evans, Esqs., contra.

Opinion of the court by WEAND, J., March 3, 1890.

David Davis executed and delivered to Mr. Jenkins, as "trustee for my creditors," a judgment, on which the fund for distribution was realized. It is now proposed to restrict payment to a certain class of creditors designated as "business creditors," to the exclusion of a mortgage creditor who held a judgment bond accompanying her mortgage, which judgment was duly entered before the one in dispute. The judgment is clear and precise in its terms, and requires no explanation upon the ground of ambiguity. It is claimed,

Jenkins, Trustee, vs. Davis.

however, that it was only intended to protect certain persons, of whom Mrs. Stacker, the mortgage creditor, was not one; and the evidence to sustain this contention is found in the testimony of Mr. Jenkins, who was then attorney for Davis; of Mr. Strassburger, who represented a creditor; and of Mr. Murphy, who was acting for Mr. Jenkins. Mr. Davis does not appear to dispute the distribution, he being now insane.

Whilst it is true that a written instrument, although unambiguous, may be explained or reformed for fraud, accident or mistake, or where it is being used against the expressed intent of the parties, we think the rule can not be successfully invoked in this case. In the first place, Davis, the obligor, does not make the claim, nor does any one in his behalf. His creditors in this respect do not stand in his shoes. They were not parties to the contract, and were not aware of the judgment until after it had been entered. As soon as delivered it inured to the benefit of all persons in whose behalf it was expressed to have been given. As there was no inducement held out by any creditor to Davis to confess the judgment, it may well be that he consented that it should be used as written, though he originally intended a different wording. It is presumed that he read and understood it before signing, and although its effect may be different from what he thought it would have as written, such belief in his mind would not alter the effect of the instrument. To hold otherwise would be to allow every obligor to construe a solemn instrument according to his construction, instead of that which the law places upon legal documents whose words are clearly and plainly written, and the effect of which is defined by law.

Mrs. Stacker, however, when she saw this judgment of record, had the right to rely upon its terms as protecting her claim. She knew that she was a creditor, and after being lulled into security by the judgment can not now, after she is prevented from taking any action to secure herself on her judgment, be cut out of her share of the fund by an intention of the judgment debtor of which she had no knowledge until too late to protect herself had she so desired. The paper "A," offered in evidence, is only corroborating proof, but is no higher or stronger than would be the mere verbal declaration of Davis, made at the time he signed the judgment; and

Poley vs. Poley.

when one gives a judgment to all his creditors, it is not in the power of a certain class of creditors to claim it for themselves, although they show that the debtor expressed it to be for their benefit. It is unnecessary to decide what the effect would be were Davis himself making the defence.

And now, March 3, 1890, the exceptions are dismissed and the report confirmed.

ANTHONY C. POLEY VS. CATHARINE OR KATE POLEY.

The reasonable cause which justifies a wife's desertion from her husband must be such as would entitle her to a divorce. Failure on the part of the husband to reprove his children when upon several occasions they spoke unkindly of their step-mother in her presence, does not constitute such reasonable cause.

Suffering the wife to take from the husband's domicile her individual property does not constitute separation by mutual consent.

SUBPÆNA sur divorce.

Charles Hunsicker, Esq., for libellant.

D. O. Rogers, Esq., for respondent.

Opinion of the court by SWARTZ, P. J., March 3, 1890.

Anthony C. Poley filed his petition for a divorce, alleging desertion on the part of his wife. The respondent in her answer denies the desertion, but alleges ill treatment on the part of the husband and his children such as to render her life burdensome and her condition intolerable, and compelling her for the sake of health and comfort to remove to her father's home. By the answer she rests her entire defence on ill treatment compelling her to withdraw from his home.

The reasonable cause which justifies a wife's desertion of her husband must be such as would entitle her to a divorce; and that is defined by the statute itself to be such cruel and barbarous treatment as endangers life, or the offering of such indignities to her per-

Poley vs. Poley.

son as to render her condition intolerable and life burdensome. Applying this test, we look in vain through the evidence for anything which approaches this high standard: *Eschbach vs. Eschbach*, 23 Penna. St. R., 343. Not a single act of cruel and barbarous treatment or offering indignity to her person is proven against the husband. He failed upon several occasions to reprove his children when they spoke unkindly to their step-mother,—this is the sum and substance of the complaint against the libellant. The children upon a few occasions disobeyed her; but the husband, when his attention was called to it, reproved them and sided with her. The only other cause of complaint urged by her was the refusal on the part of some of the children to address her by the name of “mother.”

Upon the argument of the application and depositions taken in the case, she set up, through her counsel, a defence not mentioned in her answer, to wit, that the separation from her husband was with his consent and approval. This line of her defence seems to have been an after-thought. The character of her departure can be gathered from what took place on the evening preceding her removal. Her father came to the libellant's home, bringing with him one or more neighbors, and the following conversation between the husband and respondent's father took place. The father began: “Mr. Poley, we have met here this evening on a very important call. I find there is division in this house, and the Bible teaches if a house is divided against itself it can not stand. The only way to restore peace is to separate the inmates, and for that purpose we have met to-night. Your wife will now leave you.” The libellant asked, “When?” and the father replied; “To-morrow. Will you grant her the privilege to take away the things which she brought here?” The husband answered, “Certainly.” When the libellant was told his wife was going away he replied, “That takes me down.” The father then demanded wages for the time the respondent lived with her husband, and the father says the libellant agreed to pay such wages.

The daughter of libellant testified, “The next day she gathered up her things, without saying anything about coming back. Father asked her why she was going to leave him. She said she did not want to live with us.”

Poley vs. Poley.

From these facts and circumstances we can not reach the conclusion that the separation was by mutual consent. The husband was given no opportunity to assent. The first intimation of her departure is given by the father when he announced, "Your wife will now leave you." The exclamation of the husband, "That takes me down," shows astonishment on his part over the contemplated proceeding. When she leaves he demands to know the cause of her departure, but no satisfactory answer is given.

He suffered her to take her individual property. This he could not prevent; and in *Eschbach vs. Eschbach*, *supra*, and *Klopfer's Appeal*, 1 Mona., 81, this was held insufficient to show separation by assent. The father demanded wages for the wife. It seems he not only encouraged his daughter in breaking up all hope of future marital relationship with her husband, but also endeavored to declare void the marital relationship which had existed by treating it as that of master and servant. The husband failed to pay anything as wages, and no provision whatever was made by him for the support of his wife away from his domicile. We can not agree that the evidence shows a separation by mutual consent.

The libellant is entitled to a decree of divorce from his wife.

And now, March 3, 1890, decree of divorce entered against Catharine or Kate Poley and in favor of Anthony C. Poley.

Supreme Court of Pennsylvania.

CITIZENS PASSENGER RAILWAY CO. VS. HELEN L. THOMAS.

In an action to recover damages for injuries to plaintiff's horse and carriage caused by a collision with a car of a passenger railway company, the opinion of witnesses as to whether the driver of the car might or might not have been able to stop the car on a descending grade in time to have prevented the collision is of little importance when it appears that the witnesses had no knowledge or experience whatever in the handling of street cars or operating the brakes thereof.

While a traveler on a public street has a right to drive over the tracks of a passenger railway company laid thereupon at any point, in doing so he must exercise ordinary care, and before attempting to cross he is bound to look and see that no car is coming with which he might collide; and he is not excused from this duty because the carriage curtains were down and he could not see, particularly in a case where it appears that he had heard the bells of an approaching car.

Thomas vs. R. R. Co., 5 MONTG. CO. L. R., 84, reversed.

ERROR to the Common Pleas of Montgomery county.

The case as decided in the court below is reported in 5 MONTG. CO. L. R., 84.

Joseph Fornance and Irving P. Wanger, Esqs., for plaintiff in error.

N. H. Larzelere, Esq. (M. M. Gibson, Esq., with him), for defendant in error.

The opinion of the Supreme Court was delivered February 24, 1890, by CLARK, J.

The plaintiff in this case, Helen L. Thomas, concedes that if the conductor or driver of this car could not have stopped in time to avert the accident, he was guilty of no negligence; but her contention is that if he could have done so, and did not, he was negligent, and she is entitled to recover. The only negligent act complained of, therefore, is that the conductor did not stop the car before the collision occurred.

The plaintiff testifies that she was going down Main street on one side of the track, and that her intention was to cross the track and go up the same street on the other side. In doing this she would necessarily be obliged to pass on, over and off the track in the form of a semi-circle. The driver might well have supposed, in the first instance, that she was merely turning on the track in front of him; he could only discover her full intention when she had gone far

enough to indicate her purpose to cross over. She says that at the time she undertook to cross the car was thirty feet or more distant from her, and she thought there was time to cross. Mr. Wilson, the plaintiff's witness, says he was standing at the corner of Main and DeKalb streets; that just as the plaintiff's horse was about to step on the track he saw the car; that the conductor was at the moment looking down DeKalb street, presumably for passengers, and that he called to him, "Hold on, or you will run into that lady's carriage." Whether the driver heard him or not he does not know; the car was twenty or twenty-five feet off at the time, and he did not think she could cross. He says the driver applied the brakes and swung his horses to the left, around outside of the track, to prevent a collision, but the tongue struck the phaeton and the horses were thrown against the wheels, producing the injury complained of. On cross-examination he says that when he first noticed the car "it was pretty near right on her; her horse had one foot just about to step on the track," but he thought the driver had time enough to stop. Mr. Fox testifies when he first saw the car it was above DeKalb street, in front of Baker's drug-store, and that from the time he first saw it the driver had time enough to stop before he got to the phaeton. These witnesses, however, had no knowledge or experience whatever of the handling of cars or of operating the brakes; and it must be conceded that as they testify to no specific act of negligence, their mere opinion as to whether or not the driver might or might not have been able to stop the car in time on a descending grade is of little importance: *Traction Co. vs. Bernheimer*, 23 Weekly Notes, 568. Mr. Holland says if the driver had not looked down DeKalb street he does "not suppose that the accident would have happened." This is substantially all of the testimony on part of the plaintiff bearing upon the question of the defendant's negligence, and upon this meagre and unsatisfactory proof the court submitted that question to the jury.

Mathias was both driver and conductor of the car, and when he was crossing DeKalb street there was no one in front of him on the track, and no one offering to cross. Under these circumstances it was certainly no act of negligence to observe whether there were passengers desiring to board the car on that crossing. There is no evidence that his attention was unnecessarily or for any unreasonable time withdrawn from a view of the track. Nor is there any

evidence that he failed to apply the brakes promptly and energetically when the exigency arose. No witness has suggested that the driver did anything which he should not have done, or that he failed to do anything which he could have done, to avert the accident. On the contrary, the proof on both sides is consistent, clear and positive that the brakes were applied at once. Mr. Berndt says he heard the click of the brake, and noticed that the driver put on all his force. Whatever may have been the distance between the car and the phaeton when Mrs. Thomas undertook to cross the track, and this is variously stated by the witnesses, it is plain that notwithstanding the efforts of the driver to stop the car the collision occurred. Upon this state of facts we are of opinion that the court erred in submitting the question of the defendant's negligence to the jury. There was not, we think, sufficient evidence to justify an inference of the negligent act alleged.

But assuming that the conductor, by an ordinary or an extraordinary effort, could have stopped his car in time to prevent the injury, a question still arises as to whether or not the plaintiff was not also guilty of negligence in attempting to cross the track in front of a moving car. The car was confined in its course to the rails; it could be turned neither to the right nor to the left; it was running at the usual rate of four to five miles an hour on a descending grade, and could not be stopped as readily or as quickly as her horse, which was moving at a slow walk. She knew that a car was coming and was near, for she admits she was warned by the bells; but the phaeton was curtained and the curtains were down, and she could not see the car until her horse was turned upon the track. The car, she says, was thirty feet distant, and she had reason to think there was no risk, and that she had time to cross. She would seem to have taken the chances and assumed the risk.

Assuming that it was the duty of the driver, in order to prevent a collision, to use ordinary and reasonable efforts to stop the car, the company upon the facts of this case was, we think, only responsible, if responsible at all, for wanton neglect, of which there is not the slightest proof. The plaintiff was without doubt, according to the testimony of her own witnesses, guilty of negligence in driving her phaeton right in front of a moving car. She had a right to drive on the public streets, and at any point over the company's tracks, for they were laid on the street; but in doing so she was held

to the exercise of ordinary care. The company also had a right to run their cars upon their tracks longitudinally with the street, at such reasonable rate of speed as was consistent with the safety of the traveling public; indeed, in a certain sense, the company has precedence over the ordinary travel, for their cars being confined to the track other vehicles must of necessity turn out and give the cars opportunity to pass. The plaintiff knew that cars were passing and repassing upon these tracks, and before undertaking to cross she was bound to look and see that no car was coming with which she might collide. She can not be excused from this duty because the curtains were down and she could not see; that very fact called for a more careful observation, especially as she had been warned by the bells. The distance she was in front of the car at the time is variously estimated by the witnesses; but the whole current of the testimony shows that although the brakes were promptly applied, and the speed of the car checked, yet the collision occurred.

When the plaintiff's case was closed the defendant moved for a compulsory non-suit, and the court refused the motion. Whilst this action of the court is not, or could not be, assigned for error, yet the views expressed by the learned Judge of the court below, as the ground of refusal, illustrate in the clearest manner the error into which he appears to have fallen in his charge to the jury. He says, "Whilst it is undoubtedly true that contributory negligence on the part of the plaintiff would defeat a recovery, as I understand the law—although she may have been negligent in her manner of entering upon the tracks of this railroad company—yet if the driver of the car when he was a sufficient distance from her to have averted the accident could have done it, it was his duty to do so. Although she may have been an original trespasser in going upon the track, and have been negligent in crossing in the manner she did, it was his duty, if he could have done so, to have averted this accident. If he saw her about to cross, and did not take proper measures to stop the speed of his car—if it was through his neglect, after he discovered that she was upon the track, that the accident occurred—she would be entitled to recover." The learned Judge, it is true, very properly charged the jury that if the injury was caused by the negligence of Mrs. Thomas, or if her negligence contributed in any manner to it, she could not recover; but this instruction seems, in each instance, to have been qualified by the statement that although by her failure to look she may have placed herself in a place of mani-

Passenger Railway Co. vs. Thomas.

fest danger in front of the car, yet it was the duty of the driver, observing the situation, to stop the car; and if by any means he could have done so, and did not, the company, notwithstanding her negligence, was responsible in damages for the injury. "Although in this case," says the learned Judge in his charge, "you should find that this lady may have attempted to cross this track at what might have appeared to be an unsafe distance, yet if being in that position the driver of the street car could have seen her, or did see her, and could have stopped his car in time to avert the accident, it was his duty to have done so; and if he did not, his company would be liable for damages. Therefore, as a result of this, if you should find that this accident was occasioned by the negligence of Mrs. Thomas she can not recover, no matter to what extent that negligence contributed to the accident; if it contributed in any manner she can not recover." "But," he continues, "if it was occasioned by the failure of this street-car driver to stop his car, if he could have done so, then she could recover and the company is liable."

It is plain, we think, that Mrs. Thomas, by her own negligent act, had no right to impose any extraordinary duty or obligation upon the defendant. If instead of a street car this had been a train of railroad cars running at the usual rate of speed, and approaching a road crossing with the customary warning and signals, it would certainly not be pretended that this lady would have been justified in going upon the track with her phaeton, in case of injury if she could afterwards show that the train might somehow have been stopped in time to prevent the injury. This would dispense with the whole doctrine of contributory negligence, as declared in the decisions of this court. If the plaintiff's negligence contributed to the injury, under the facts of this case she can not recover; this is too well established in Pennsylvania to admit of any question or to require the citation of authorities.

In establishing the negligence of the company the burden of proof is upon the plaintiff, and we think she has failed in establishing a state of facts from which negligence could fairly be inferred. And although she is not required to prove the absence of contributory negligence, in the first instance, it is incumbent upon her to show a case clear of contributory negligence on her part, and this

Shrawder vs. Snyder.

she has not done. Her own testimony, taken with that of her own witnesses, clearly convicts her of negligence, which was the principal if not the sole cause of the injury.

The judgment is reversed.

Court of Common Pleas of Montgomery County.

SHRAWDER VS. SNYDER.

To enable one tenant in common to recover against a co-tenant, an actual ouster need not be accompanied with actual force. Possession of the whole premises with an assertion of title thereto is sufficient.

A became tenant by the curtesy in 1846 of his wife's one-half interest in real estate, of which he owned the other half. In 1886 he mortgaged the whole premises. On a sale under the mortgage O. became the purchaser, and secured possession of the whole property. *Held*, that A's wife could maintain ejectment for her one-half interest; and that under the acts of 1850 and 1863 no title to her interest passed to the purchaser.

MOTION for judgment *non obstante veredicto*.

Geo. N. Corson and Chas. Hunsicker, Esqs., for plaintiff.

Childs & Evans, Esqs., for defendant.

Opinion of the court by WEAND, J., April 2, 1890.

In 1846 Hannah Custer and Mrs. Shrawder, wife of Joseph Shrawder, were the owners of the land in dispute, having inherited the same from their father, Levi Custer. In 1846 Hannah Custer and Joseph Shrawder and wife conveyed the land to Dr. Schrack, who then reconveyed it to Joseph Shrawder. The acknowledgment of the deed to Schrack was defective in not having a separate examination of Mrs. Shrawder. She therefore was still the owner of the one-half interest.

In 1886 Joseph Shrawder mortgaged the premises to George W. Oliver. Suit having been brought upon the mortgage, the property was sold by the Sheriff and bought by Chandler, executor of Oliver. Snyder, the defendant, went into possession of the whole premises under Oliver. Shrawder and wife lived upon the premises from 1846 to 1888 and subsequent to the sale. Mrs. Shrawder

Shrawder vs. Snyder.

brings ejectment to recover her one-half interest. Upon these facts the court entered judgment for the plaintiff, reserving the question of law as to whether the plaintiff could recover. The defendant moves for judgment *non obstante veredicto* upon four grounds, which we will dispose of in their order.

1st. Because plaintiff, being at best a tenant in common, can not recover in ejectment against her co-tenant without proof of actual ouster.

As a general proposition, this is true; but plaintiff contends that the circumstances of this case show an actual or at least a constructive ouster sufficient to warrant a recovery. The writ in this case was for the recovery of the whole tract, but on the trial plaintiff filed a disclaimer for one-half of the undivided portion. The service of the writ upon the defendant is *prima facie* evidence of his being in possession, and this, together with his general plea of not guilty, is equivalent to a denial of plaintiff's claim of ownership or right of possession. I do not understand the law to be that to constitute an actual ouster it should be accompanied with real force. An entry into possession and an assertion of ownership by virtue of a deed is in effect an ouster, for it is a denial of the right of possession and the title of another: *Cumberland Valley R. R. Co. vs. Whanahan*, 9 P. F. S., 23; *Law vs. Patterson*, 1 W. & S., 184; *Hill vs. Hill*, 7 Wr., 521; *McMahan vs. McMahan*, 1 H., 376.

2d and 3d. Because plaintiff relies upon a seizin which ended in 1846, and because the marriage and seizin of the land being before the act of 1848, Joseph Shrawder became seized of an estate for life therein, which he could convey and which could be sold for his debts. Were it not for the acts of 11th April, 1848, P. L. 536, 22d April, 1850, P. L. 553, and 1st April, 1863, P. L. 212, this contention would undoubtedly be correct.

The act of 1848, however, was an effort to protect the estates of married women and to give relief from claims of the husband's creditors. It was not intended, however, to affect the vested rights of husbands, and did not protect them for the wife's benefit against the claim of his creditors: *Lancaster Co. Bank vs. Stauffer*, 10 Penna. St. R., 398; *Lefevre vs. Witmer*, Id., 505. As the law then stood, Joseph Shrawder having a life estate in his wife's land his creditors could have sold the same for his debts. The effect of this was to annul or render inoperative the very purpose of the act of 1848.

Shrawder vs. Snyder.

Speaking of this act, C. J. Woodward, in *Harris vs. York Mutual Ins. Co.*, 14 Wr., 341, said: "The whole truth is that the Legislature meant to exempt the wife's estate from liability to her husband's creditors, but not to impair his common law interest in her real estate. After we had declared this in several cases, and treated the husband's curtesy as a vested interest, and still liable to the execution of his creditors, the Legislature declared by the act of April 22, 1850, that the wife's estate shall not be subject to execution by reason of the husband's interest therein, but the same shall be exempt from levy and sale during her life. As the wife's estate has never been, since 1848, subject to executions against her husband, the meaning of the act of 1850 must be that his curtesy shall not be levied and sold during her life. For her convenience and benefit his creditors shall be stayed from proceedings against his estate while she lives. The upshot is a mere stay of execution, not an annihilation of his estate."

All of the cases cited by defendant from 2 Binn., 91, to 83 Penna. St. R., 82, are answered by the above reasoning. They all rule that the act of 1848 did not destroy the husband's interest acquired prior to the act of 1848, and we have been unable to find any case which rules that although the husband's interest vested prior to 1848 it could be sold since the act of 1850 upon a judgment subsequently recovered; and it must be, as stated by Judge Woodward, because since 1848 the wife's estate has not been subject to execution for her husband's debts. Neither the act of 1848, 1850 or 1863 deprives the husband of any vested rights as to his enjoyment of his wife's property, but they simply give notice to those dealing with him that thereafter they should not have execution against her lands during her life. It affected no vested rights of creditors because they could have none until execution issued. It is claimed, however, that as the husband's interest vested prior to 1848, he and his creditors stand in the same position now that they did then, and that although the mortgage to Oliver was given in 1886 the case is to be tested as though not affected by the acts of 1848, 1850 and 1863, which were not intended to be retrospective; and, if so, can not affect the rights of the husband or his creditors. It has repeatedly been held that an act which operates merely upon the remedy and not upon the right is not bad. In support of this position may be cited *Breitenbach vs. Bush*, 8 Wr., 317, where it was decided that

Shrawder vs. Snyder.

the act of April, 1861, which provides that no civil process shall issue or be enforced against any person mustered into the service of the state or the United States during the term for which he shall be engaged in such service, nor until thirty days after he shall have been discharged therefrom, provided, etc., was held constitutional and retrospective, even although in the case a stay had been agreed upon and had expired before the passage of the act. *Chadwick vs. Moore*, 8 W. & S., 49, is to the same effect.

The act of 1851, allowing the widow's exemption of \$300, applies to the claim of a creditor before its passage, and is constitutional: *Baldy's Appeal*, 4 Wr., 328. So, also, *Spencer's Appeal*, 3 Casey, 218; *Coxe vs. Martin*, 8 Wr., 322. The act of 1850 expressly says "that the real estate of any married woman in this commonwealth shall not be subject to execution for any debt against her husband on account of any interest he may or may have had therein as tenant by the curtesy, but the same shall be exempt from levy and sale for such debt during the life of said wife." The act of 1863 is equally positive: "No judgment obtained against the husband of any married woman, before or during marriage, shall bind or be a lien upon her real estate, or upon any interest the husband may be entitled to therein as tenant by the curtesy." Neither act makes any distinction between land acquired before or after the act of 1848, and if we disregard the plain language of either statute we undo all that was intended for the benefit of the wife, and again place her in that deplorable position—from which the law intended to relieve her—of having her property taken from her during the life of her husband and given to his creditors. If such be the law, we prefer that some higher authority shall declare it to be so.

The fourth position is that even if the law restricts the right of execution, yet the husband has the right to sell; that a mortgage is a conditional sale, and that therefore a sale upon the mortgage is in effect completing the sale. This ignores the plain reading of the act that no judgment against the husband shall be a lien upon her real estate, and that her property shall be exempt from sale.

We are therefore of opinion that the sale in this case did not pass any title to Mrs. Shrawder's one-half interest, and that she is entitled to recover in this action.

Weikel's Bond.

And now, April 2, 1890, motion for judgment *non obstante veredicto* overruled, and judgment directed to be entered for plaintiff upon the verdict of the jury.

Court of Quarter Sessions of Montgomery County.

IN RE BOND OF NOAH W. WEIKEL.

The act of February 14, 1889, P. L. 6, which provides that the qualified voters of every borough and township of the commonwealth shall, on the third Tuesday of February next, and triennially thereafter, vote for and elect a properly qualified person for Constable in each of said districts, who shall serve for three years, went into effect on the third Tuesday of February, 1889, and Constables elected in said districts on that day are to serve for three years.

APPLICATION of Noah W. Weikel for approval of his bond as Constable for the borough of North Wales.

William H. H. Gibbs was elected Constable of the borough of North Wales at the election in 1889, and claimed the office for the term of three years.

At the spring election in 1890 the applicant was voted for and claimed to be elected as Constable for three years.

Wm. F. Dannehower, Esq., for Weikel.

Edward E. Long, Esq., for Gibbs.

Opinion of the court by SWARTZ, P. J., April 14, 1890.

This application raises the question whether the act of February 14, 1889, P. L. 6, went into effect at the February election of 1889. The act provides that "the qualified voters of every borough and township of the commonwealth of Pennsylvania shall, on the third Tuesday of February next, and triennially thereafter, vote for and elect a properly qualified person for Constable in each of said districts, who shall serve for three years."

From the statement of facts agreed upon and filed in this case, we learn that the bill which ripened into the act of February 14, 1889, was introduced into the Senate on the 24th of January, 1889, and passed on the 31st day of the same month. The bill passed in the House on February 13, 1889, and became a law by the signature of the Executive on the following day. The Legislature deemed it wise and beneficial to change the existing law, and the people

Weikel's Bond.

were entitled to the benefits secured by the new act at the earliest day consistent with the intent and fair interpretation of the act; and therefore if the act, without any forced construction, may be read so as to apply to the spring election of 1889, it should receive that interpretation rather than the one which postpones the benefits of the act to the spring election of 1890, although such latter interpretation may conform equally to the intent of the act as expressed by the language used.

The wording of the act will admit of either interpretation. By strict grammatical construction "next" may be said to limit or qualify "February." The grammatical construction of a statute is one mode of interpretation; but it is not the only mode, and is not always the true mode: *Fisher vs. Connard*, 100 P. S. R., 63. When the act was approved the third Tuesday of February had not arrived. This was the coming election day at which Constables were chosen, and by the words "the third Tuesday of February next" we think the Legislature intended to designate the next election day. If such was the intent it must prevail, for "statutes are to be construed so as may best effectuate the intention of the makers." This rule overrides any grammatical construction that may be in its way.

If it was proper to enact a law, what purpose could the Legislature have in delaying its operations? True, the act was passed within ten days of the coming election; but this is immaterial. The provisions of the law that Constables shall give ten days notice previous to the election day is not affected by this act. The Constable must enumerate the officers to be elected and designate where the election is to be held. He is not required to set forth the term of office.

The argument that there was not sufficient time before the election for the people to acquaint themselves with the act is without weight. Most of our acts of Assembly are enforced before the people have any knowledge of the fact that such laws were enacted.

If there was no cause to delay the operation of the act, why should we select that interpretation which indicates that the Legislature acted without any purpose in view?

To grasp the intention of the Legislature we must give to the language used the signification it had at the time it was used. "All laws must be executed according to the sense and meaning which

they imported at the time of their passage": *Com. vs. Erie & N. E. R. R. Co.*, 27 P. S. R., 353.

If we refer to the journals of the legislative bodies we have the undisputed facts that the bill was introduced in the Senate in January, and finally passed in the same month by that body. That we may make such reference in aid of interpretation to ascertain an undisputed fact as to time we think can not admit of doubt, especially where the language of the act is more or less ambiguous and admits of double interpretation.

Such resort was had in a case similar to the one at bar in *Fosdick vs. Perrysburg*, 14 Ohio, 472, where the court held that an act passed May 3, 1852, to go into effect "from and after the 15th day of May next," went into effect May, 1852—that is, the same month in which the act became a law. The right to use the journal of each house for such limited purposes was recognized by our own court in *Southwark Bank vs. Com.*, 26 P. S. R., 450.

When the Senate declared on the 31st of January, 1889, that the qualified voters should elect a Constable on the third Tuesday of February next, it left no room for doubt that that body at least intended the act to go into effect at the spring election of 1889. The House acted on the bill in February, but it reached this body with a clear indication that the Senate declared the act should apply to the spring election of 1889, and with this knowledge the House approved and passed the bill. The act was signed by the Governor on the 14th of February, and became a law from that date; but the signature of the Executive could not change the interpretation of the act nor alter the intent of the Legislature. He may approve or disapprove the act; he may recommend to the General Assembly such measures as he may judge expedient,—but he can not legislate.

We conclude that to effectuate the intention of the makers we must hold that the act went into operation in February, 1889, and that such intention can be gathered from the language of the act itself when we consider the purpose of the enactment; that if the language is ambiguous, such ambiguity is resolved when we give it the signification that the words received when they were used by the legislative bodies.

On February 19, 1889, Mr. Gibbs was elected to the office of Constable to serve for three years; therefore we can not approve the bond of the applicant.

And now, April 14, 1890, the rule in this case is discharged.

Court of Common Pleas of Montgomery County.

THIRD NATIONAL BANK OF PHILADELPHIA, ENDORSEE OF HENRY R. HUNSICKER, TO USE OF J. R. HUNSICKER, AND NOW TO USE OF REBECCA SWENK, VS. JOHN D. HUNSICKER.

118, November T., 1873.

A compromise made by an attorney for the benefit of his client can not be manipulated by the attorney so as to give him the advantage of such compromise at the expense of the client.

The act of 14 March, 1876, relating to the satisfaction of judgments by the Prothonotary, can only apply where the evidence clearly shows payment in full. If there is a substantial dispute about the facts, the act has no application.

By a literal interpretation of the act of 23d May, 1887, a legatee or heir may testify in behalf of the estate in a proceeding by a claimant against the estate, whether the testimony relates to matters occurring before or after the death of the testator.

RULE to show cause why judgment should not be marked satisfied by the Prothonotary, according to the provisions of the act of Assembly approved March 14, 1876.

The Third National Bank of Philadelphia, endorsee of Henry R. Hunsicker, held two notes against John D. Hunsicker of \$1,400 each, on one of which suit was brought and judgment obtained and entered in the Prothonotary's office of Montgomery county in Docket W, page 500, on the 15th day of November, 1873, for \$1,415.06.

Jacob R. Hunsicker, as counsel for his brother, Henry R., and the estate of his father, John D. Hunsicker, effected a settlement with the bank by which he was to pay one thousand dollars as a cancellation of the entire debt of some \$2,800. To do this he alleges he borrowed the money from his mother-in-law, Mrs. Rebecca Swenk, paid the bank the amount agreed upon, and on the 2d of April, 1879, had the judgment marked to his use, which was the same day marked to the use of Rebecca Swenk, and which it is alleged has never since been paid.

Henry R. Hunsicker, whose was the real debt on the notes, alleges, on the contrary, that he himself paid the moneys in full to Jacob R. Hunsicker, which went towards the settlement with the bank of the judgment in question, and herein arises the rule to show cause why satisfaction should not be entered of record.

Bank to use vs. Hunsicker.

Childs & Evans, Esqs., for rule.

James B. Holland and John M. Dettra, Esqs., contra.

Opinion of the court by SWARTZ, P. J., April 14, 1890.

Judgment was entered against the defendant in the above suit November 15, 1873. The testimony offered to show that the judgment is paid discloses that the note upon which suit was brought represented the debt of Henry R. Hunsicker. Jacob R. Hunsicker acted as counsel for John D. Hunsicker and said Henry R. Hunsicker.

The same plaintiff held another note against the defendant; this note was likewise the debt of Henry R. Hunsicker. The indebtedness upon the obligations was compromised at one thousand dollars. This money was raised by Jacob R. Hunsicker, and when the money was fully paid to the plaintiff the judgment was assigned to said Jacob R. Hunsicker, who upon the same day assigned it to the present holder, Rebecca Swenk.

If Jacob R. Hunsicker paid the money to the plaintiff, he was entitled to the judgment, and it was a valid security in his hands for the amount actually paid by him for the assignment. He could not hold it for the face value of \$1,415.06, for he compromised for the benefit of his client at one thousand dollars, and he could not deprive his client of this benefit.

When the judgment was assigned by Mr. Hunsicker to Mrs. Swenk, he was indebted to his father, the defendant, upon a promissory note in a sum exceeding the amount due on the judgment. The father held this note at the time of his death, and there is nothing before us to show that the note was applied to the payment of the judgment. Nor is it shown that the assignment was made to defraud the father. Jacob R. Hunsicker was the owner of the judgment, and as such owner his transfer was valid. Whether it was valid or not is a matter that can not be inquired into under the present rule. The petitioner alleges that it was paid in cash and notes which were accepted as cash or payment, and this is the only inquiry before us under the act of March 14, 1876. Under this act satisfaction can be ordered only where there is "actual payment in full": *Felt vs. Cook*, 95 Penna. St. R., 247; *Riddle's Appeal*, 104 Id., 171.

Does the testimony before us show such actual payment in full?

Bank to use vs. Hunsicker.

John D. Hunsicker is dead, and it is therefore necessary to determine whether the evidence taken under the rule is competent—that is, were the witnesses competent.

If the evidence taken is to be considered, we can not order satisfaction, for the act does not apply where the facts are disputed: Riddle's Appeal, *supra*; Horton vs. Hopf, 4 W. N. C., 381. As the evidence now stands, there is a substantial dispute about the facts. Henry R. Hunsicker swears he paid the money to Jacob R. Hunsicker, but the latter denies that he received any money on account of the judgment, but admits payments to himself, alleging that they were on account of moneys due him by Henry R. Hunsicker for cash loaned and advanced independent of the judgment in question.

Jacob R. Hunsicker is not a competent witness. John D. Hunsicker is dead, and his interest in the controversy is represented by another; and if Jacob R. Hunsicker is not a surviving party, he is at least a person whose interest is adverse to the right of the deceased party.

Henry R. Hunsicker is a legatee under his father's will, and is not a person whose interest is adverse to the right of the deceased party; but, on the contrary, his evidence, if admitted, will serve to establish the right of the deceased party. In Meredith vs. Thomas, 4 Kulp, 505, it was held that the interest of a legatee or heir will not exclude his testimony on behalf of the estate in a proceeding by a claimant against the representative of the estate; and in Porter vs. Nelson, 121 Penna. St. R., 640, the court said, according to the letter of the act of May 23, 1887, P. L. 158, such heir or legatee is a competent witness to establish any fact, whether occurring before or after the death of the testator.

But Henry R. Hunsicker is not interested simply as a legatee; in one sense he may be said to be a surviving party "in the subject in controversy." His interest and that of the representative of John D. Hunsicker are identical. The debt for which John D. Hunsicker became liable is the debt of Henry R. Hunsicker. Payment by the estate creates a liability on the part of Henry R. Hunsicker to reimburse the estate. The statute of limitations may have barred any direct liability to the holders of the note on the part of Henry R. Hunsicker, but such bar would not protect him upon a suit by the estate for reimbursement after the estate pays the judgment. Such liability would begin when the payment is made by the estate: Mar-

Bank to use vs. Hunsicker.

tin vs. Frantz, 24 W. N. C., 325. To allow Henry R. Hunsicker to testify under the foregoing circumstances as to matters which occurred between himself and his brother, Jacob R. Hunsicker, when the mouth of the latter is closed, would work a serious hardship, and we hesitate to give the act of May 23, 1887, such an interpretation. While one of the parties to a contract in litigation is denied the privilege of testifying, the policy of the law is to close the mouth of the other: Foss's Appeal, 105 Penna. St. R., 266.

Perhaps the act should be so interpreted as to allow both to testify as to matters occurring between themselves. The word "partners" in the act of May 25, 1878, P. L. 153, was held to mean any two or more who jointly contract. Those jointly concerned in a transaction are partners under said act: Ash vs. Guie, 97 Penna. St. R., 493. Giving a similar meaning to the word "partners" in the act of 1887, it may be said that Henry R. Hunsicker by his appearance as a witness stands in the light of a surviving or remaining partner in the proceedings, and as such under the act is competent to testify to matters occurring between himself and the other party on the record, or between himself and a person having an interest adverse to him.

We conclude that either Henry R. Hunsicker is not competent, or, if competent, then his brother, Jacob R. Hunsicker, is also competent as to matters occurring between these two persons. In either event, the rule must be discharged. If Henry R. Hunsicker is incompetent, then there is no evidence upon which we can order the judgment satisfied. If competent, then there is a conflict of evidence and such a substantial dispute of facts that the act of March 14, 1876, has no application, as decided in Riddle's Appeal, *supra*.

If we are in error, and under the law the testimony of Henry R. Hunsicker should stand without any evidence to contradict him, still we can not see our way clear to order the judgment satisfied. The petition alleges payment; the answer is just as positive that the "judgment was never paid by the defendant or by any person for him." There is, therefore, oath against oath, with the evidence of an interested witness in favor of the petitioner, and we can not say that we are "clear that the judgment was paid," or "that the facts are undisputed," or that there is not "a substantial dispute about the facts": Riddle's Appeal, *supra*.

And now, April 14, 1890, the rule in this case is discharged.

WILLIAM C. SAUNDERS VS. JACOB G. LANDES.

In an action to recover damages for a malicious prosecution the jury determines what facts are proved, but the court decides whether they amount to probable cause or not.

The advice of counsel is no protection to the defendant unless he fully, fairly, honestly and truthfully stated the facts to the attorney.

Where the defendant acts upon information derived from others, there must be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the accused is guilty.

MOTION and reasons for a new trial. 119. Oct. Term, 1887.

J. V. Gotwatts, Esq., for motion.

George W. Rogers, Esq., contra.

Opinion of the court by SWARTZ, P. J., March 3, 1890.

We re-read carefully all the evidence in this case and examined the charge. In our opinion there was no error upon the trial which calls for a rehearing.

It is claimed that we admitted evidence to contradict the record of the justice of the peace. No such evidence was allowed; but we did admit evidence as to what the plaintiff himself said at the hearing, but not for the purpose of contradicting the record, but as a part of the facts material to the issue on trial.

The seventh exception declares that "the court ought to have instructed the jury that if they found that the prosecution was instituted for the purpose of securing the policy or any money alleged to have been collected on it, that this of itself showed a want of probable cause." We think that the charge shows that such instruction was given. On the bottom of page seven we find this language: "If that was the object, to use the criminal process for no other purpose than to get back the papers, to put the plaintiff in this case in such a plight by using the criminal process, that the plaintiff would give them up by reason of the circumstances and pressure under which the criminal process might bring him, then it was an improper use of the process of the court, and it would show a want of probable cause and would imply malice."

We charged the jury that the advice of counsel was no protection to the defendant unless he "fully, fairly, honestly and truthfully" stated the facts of his case to counsel. This complied

Saunders vs. Landes.

with the law as laid down in *Smith vs. Water*, 125 Penna. St. R., 453. In fact, the plaintiff made no point as to the adequacy of defendant's statement to his counsel.

The only question remaining for our consideration is the instruction of the court upon "probable cause." "The jury determines what facts are proved, but the court decides whether they amount to probable cause or not": *Beach vs. Wheeler*, 30 Penna. St. R., 72. Probable cause exists "where there is a reasonable ground for the belief that the party charged is guilty." "There must be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty": *Stier vs. Lalor*, 16 W. N. C., 273. Applying these principles to the facts in evidence, there was no error in charging the jury. "If you believe that Mr. Rose made the statement to Mr. Landes that Mr. Landes alleges was made to him, and if you find further that Mr. Landes believed the statement that was made to him [if you find that Rose made it to him], and he acted honestly upon that information, and that his purpose was to bring this plaintiff to justice, that that was his honest motive, and that there was no other and improper motive inducing him to bring the prosecution, then Mr. Landes was justified in bringing the prosecution; in other words, he had probable cause for doing it." The defendant testified that he wrote to the plaintiff and received a reply stating that the plaintiff had neither the policy nor any money collected on it. That within a week or two Mr. Rese informed him that he saw a letter in the office of an agent in Philadelphia, naming him and the place where he had seen the letter, and that this letter came from the company which had issued Mr. Landes' policy, and set forth that the plaintiff had settled the policy with the company, and that the money was paid.

In *Bernar vs. Dunlap*, 94 Penna. St. R., 329, the following facts were held sufficient to constitute probable cause. The plaintiff was charged with the larceny of a pair of gloves; the prosecutor did not appear at the hearing, and the case was dismissed. Upon the trial for malicious prosecution, the alderman was called by the plaintiff and testified: "Mr. Dunlap came to my office in the presence of Mr. Curtis, and Mr. Curtis said he had seen Dunlap's gauntlets in possession of Mr. Bernar; my recollection is that Curtis said they were Dunlap's gauntlets." *Guillford vs. Windel*,

Tyler vs. Bertolet.

108 Penna. St. R., 142, is to the same effect. The defendant justified a charge of larceny by showing he acted upon the information of others.

And now, March 3, 1890, the motion and reason for a new trial are overruled, and a new trial is refused.

L. A. TYLER VS. A. B. BERTOLET.

The payment of the taxed costs upon an appeal from the award of arbitrators is a condition precedent to a valid appeal. The opposing party may waive the payment of costs, but mere silence on his part without any proceedings in the cause do not constitute a waiver.

A rule to perfect the appeal will not aid the losing party, for no appeal was taken.

MOTION to strike off appeal from award of arbitrators.

57. June Term, 1883.

F. G. Hobson, Esq., for motion.

Opinion of the court by SWARTZ, P. J., March 3, 1890.

Arbitrators awarded in favor of the plaintiff. The defendant entered an appeal from the award.

There was no recognizance taken and filed, such as the act of Assembly requires, the appellant's own recognizance being taken without bail. No costs were paid. The plaintiff took no further proceedings in the cause, but now asks that the appeal may be stricken off.

Failure to pay costs, as taxed, was an incurable defect; it is a condition precedent to a valid appeal: Carr vs. McGovern, 66 Penna. St. R., 457.

Under this motion we can not grant a rule on the defendant to perfect his appeal, for there was no appeal: Kerr vs. Martin, 122 Penna. St. R., 436.

Can the appeal be quashed at this late day? Nothing was done by either party subsequent to the entry of defendant's recognizance. The plaintiff may waive the payment of costs, but has not done so by any act that is brought to our notice.

Silence can only estop when by such silence another is misled to his injury. By laches the plaintiff may waive a defect in the appeal, but we fail to see how laches can call into existence that

South Bethlehem vs. Davis.

which never did exist. The defendant took no appeal, and time can not give him an appeal.

And now, March 3, 1890, the motion in this case is made absolute.

Court of Common Pleas of Northampton County.

SOUTH BETHLEHEM VS. DAVIS.

A municipal lien covering two distinct properties separated from each other by a public street is null and void, but where the claim is apportioned so that one of the properties may be stricken from the lien without disturbing the remainder of the lien, an amendment to that effect will be permitted.

RULE to strike off lien.

R. L. Cope, Esq., for rule,

J. D. Brodhead, Esq., contra.

Opinion of the court by SCHUYLER, P. J., January 22, 1890.

This is a lien for curbing and paving filed against two distinct properties separated from each other by a public street. It has been decided that a mechanic's lien open to this objection is null and void: *Goepp vs. Gartiser*, 35 Penna. St. R., 130; and by parity of reasoning the present lien would have to be declared void, but for the fact that since *Goepp vs. Gartiser* was decided, an act of Assembly has been passed—Act of 11 June, 1879, § 2, P. L. 122, P. D. 1168—authorizing and requiring the courts “to permit amendments conducive to justice and a fair trial upon the merits.” Fortunately for the borough in the present case, the amount of work and material done and furnished to each property is distinctly stated, so that one of the properties and its proportion of indebtedness may be stricken from the lien without disturbing the remainder of the lien, which would then stand freed from the objection we have been considering, that being the only objection urged against it. Instead, therefore, of striking off the lien in the first instance, it is but just that the borough should have a reasonable time within which to move to amend, failing in which the present rule will be made absolute.

Court of Quarter Sessions of Montgomery County.

LICENSE APPLICATIONS.

IN RE PETITION OF E. A. KITE, JR.

Bottler's license.—Necessity therefor.

In this case the applicant asked for a license at the county seat, where the two persons already licensed only bottled liquor of their own make, and it was shown that there was demand for malt liquor made elsewhere, the license was granted.

The selling of liquor to be used on Sunday and at other times along the river banks or other public places condemned.

APPLICATION for bottlers' license.

John W. Bickel, Esq., for applicant.

Isaac Chism, Esq., contra.

Opinion of the court by WEAND, J., May 5, 1890.

The petition and testimony in support of this application show, that in the borough of Norristown there are but two bottlers, and they only sell malt liquor of their own make. This practically amounts to a monopoly in this particular business, unless dealers who desire other kinds of malt liquor send to a distance for them. If we concede the right to sell this kind of drink, we should also within reasonable limits, afford the opportunity for obtaining such as are most in demand; and we are informed that there is a frequent demand on behalf of retail dealers and others for malt liquors manufactured elsewhere. To grant the license is not therefore to afford additional facilities for obtaining drink in the ordinary sense of duplicating licenses.

The borough of Norristown is the county seat, and has an increasing population, which attracts to it the citizens of the county. Its railroad facilities afford opportunities for retail dealers to obtain their supplies without going outside of the county limits; and the reasons for bottling establishments here are not to be compared with those urged in favor of similar establishments in the county. The place is conveniently situated with reference to railroads, and the applicant is shown to be a person of good moral character, and well acquainted with the business. His lists of signers embrace the names of many respectable citizens, saloon and restaurant keepers,

In re Konetzki License.

and we feel that his petition should be granted. The principal objection against it is that it may afford opportunities for persons to obtain liquor by the keg, kettle, and otherwise, to be used along the river banks and other places on Sunday and other times. And we are told that disorderly scenes of this nature are now of frequent occurrence.

We now throw out a note of warning. A dealer who sells liquors, knowing it to be used in this way; or who may suspect such to be the result, or who sells to parties whose appearance and habits would give rise to reasonable suspicion that it was to be used, is guilty of an offence which, in our opinion, would render him unfitted to hold a license from the court. Much of the discredit thrown around the trade, and the complaint against the traffic, is caused by the conduct of the dealers. If the privilege granted them is worth having, they should endeavor, by a strict compliance with the law, to prevent scenes of debauchery and bad conduct, which inevitably follows where they sell to parties whom they may have cause to suspect will make an improper use of their purchase.

IN RE KONETZKI LICENSE.

The selling of liquor to a person of known intemperate habits is such a violation of the act of 1887 as will compel the court to revoke the license; and it is no excuse that the sale was made when the person to whom it was sold was sober.

RULE to show cause why restaurant license should not be revoked.

Isaac Chism, Esq., for rule.

Jacob V. Gotwalts and *Wm. F. Solly, Esqs.*, contra.

Opinion of the court by WEAND, J., May 5, 1890.

This case has developed an unusual interest on behalf of the licensee, and the remonstrants insist with great earnestness that their motion shall prevail. Amongst the signers to the petition are some of our most influential citizens, who by their character and number are entitled to receive from the court a careful and impartial consideration of the case.

The principal objections against the house are that it is not necessary to accommodate the public, etc., and that the applicant is

In re Konetzki License.

not a fit person to whom a license should be granted. In support of the latter position it is alleged that Konetzki has sold liquor to persons of known intemperate habits, and has thus violated the act of 1887, rendering it imperative on the court to revoke his license. By the 17th Section of the act of May 13, 1887, it is provided that it shall not be lawful for any person, with or without license, to furnish by sale, gift or otherwise to any person, any spirituous, vinous, malt or brewed liquors on any days upon which elections are now or may hereafter be required to be held, nor on Sunday, nor at any time to a minor or a person of known intemperate habits, or a person visibly affected by intoxicating drinks, either for his or her use, or for the use of any other person, etc., etc. Violation of this section is declared to be a misdemeanor.

It is contended that this applicant has violated the law in this respect in two instances by selling malt liquors to John Stiver and Thomas J. Rambo, both of whom are admitted to be of the forbidden class. Rambo has been declared an habitual drunkard by this court, some ten years since. Mr. Konetzki, in his testimony, admits that he sold malt liquor to Stiver about last Christmas, and that he stopped selling to him when he heard that his wife had forbidden others to sell to him. He had known Stiver for many years and had refused him drink when he thought from his looks he ought not to have any. It was admitted that Stiver was a person of known intemperate habits and the evidence proved it. The sales to Rambo are also admitted, and in both instances they occurred within two years. It is no excuse to say these men were sober when the liquor was furnished, for it is these sales which produce the intoxication. In neither case can ignorance be pleaded which might afford a moral if not a legal excuse. This being the admitted state of the case, what is our duty on a petition for relicense? Are we to treat a person who thus violates the law and abuses the confidence reposed in him by the court as a fit person to receive and have a license? If this was a discretionary matter with the court, the time which has elapsed might induce us to overlook the offence; but unfortunately for the applicant our duty is clearly defined by the 7th Section of the act of 1887, which reads: "Upon sufficient cause being shown or proof being made to the said court that the party holding a license has violated any law of this commonwealth relating to the sale of liquor, the Court of Quarter

In re Monaghan License.

Sessions shall, upon notice being given to the person so licensed, revoke the said license."

The command is imperative and leaves us no discretion; and, therefore, unless we ourselves, unmindful of our duty and our oaths of office, violate this plain mandate, we are compelled to make this rule absolute. If this seems like harsh law the fault is not with us but with those who enacted it. Our duty is simply to execute it as we find it written, and we have in several cases announced this as the law of the court and our intention, following our duty, to enforce it. He who knowingly and deliberately places himself in a position to be thus treated has no one but himself to blame.

And now, May 5, the rule is made absolute and the license is revoked.

IN RE MONAGHAN LICENSE.

An applicant for a hotel license must show that such hotel is necessary for the accommodation of the public and the entertainment of strangers and travellers; the existence of a mere drinking place for the employes of a large manufacturing industry in the vicinity does not show a necessity for a hotel.

One entrusted with a retail liquor license may not sell to minors, to a person of known intemperate habits, or to a person visibly affected by intoxicating drinks, and ignorance of these facts will not excuse or justify such sales.

RULE to show cause why hotel license should not be revoked.

G. R. Fox & Son, Esqs., for rule.

Charles Hunsicker, Esq., contra.

Opinion of the court by SWARTZ, P. J., May 5, 1890.

The respondent, Michael W. Monaghan, was granted a retail liquor license, and we are now asked to revoke this licence.

The remonstrants claim that the evidence taken shows a want of necessity for the hotel and a violation of the liquor laws.

The hotel is located on the river road, at Pencoyd, in Lower Merion township. The large iron works of A. R. Roberts & Company surround and hem in the hotel premises. These works employ sixteen hundred hands. According to the evidence ninety per centum of the hotel patronage comes from these workmen.

Mr. Monaghan testifies that it is three months since a stranger or traveller spent the night with him as a lodger, and another wit-

In re Monaghan License.

ness testifies that no one stopped at the hotel for a night during a period of one year and seven months. The proprietor himself can not remember the time when he was called on to furnish stabling for the beast of a traveller. His hotel is without proper stabling accommodations. In August last he rented a stable three-quarters of a mile from the hotel premises, but thus far he has had no occasion to use it for his hotel business. He seems to serve very few meals; for his wife, with a family of five children, is able to furnish the service without the aid of a servant in constant attendance. The house is large, but is occupied by three families besides that of the proprietor; and, notwithstanding this occupancy by tenants, there is sufficient room left for a store-room, wherein Mr. Monaghan carries on the grocery business.

The river road is vacated or abandoned below the iron works, and very little travel is found upon the road even north of this point other than that connected with the iron works. The surroundings of the hotel have changed materially since the first granting of the hotel license. The iron works were enlarged, and absorbed a number of the private dwellings in the vicinity. These circumstances, and the evidences of the witnesses called, established the fact that the hotel is a mere drinking place for the employes of the iron works. The law does not contemplate the licensing of a hotel for mere drinking purposes. The hotel must be "necessary for the accommodation of the public and the entertainment of strangers or travellers." This drinking place is a constant menace to the iron works; the men while on duty will frequent the house and indulge. Many of them hold responsible positions, and their intoxication is not only prejudicial to the interests of the employer, but endangers their own safety and that of their fellow-workmen.

But if we should be in error in holding that the hotel is unnecessary, still the license must fall. Mr. Monaghan, according to the evidence, violated the liquor laws and conducted his business in an improper manner. He sold lager beer to three minors at different times. He denies this charge in part, and alleges that if any sales were so made they were not intentional; that he honestly believed the boys were of age. In the light of the evidence before us it is difficult to believe that the sales were honestly made in ignorance of

In re Monaghan License.

the facts. After he was notified not to sell to the Graw boy because of his age and habits, he should have refused him liquor after such notice, even if he believed the boy had attained his majority. He should at least have informed himself as to the boy's age from some reliable source before renewing the sales. The fact remains that he sold to a minor, and to one whose drinking habit at the early age of nineteen was such as to call forth the intervention of his relatives, who notified Mr. Monaghan not to sell the boy any intoxicating drink. The minor was furnished beer after such notice; whether the violation of the law was intentional is immaterial. In Carlson's License, 127 Penna. St. R., 330, Paxson, C. J., said: "The only excuse offered was that they did not know the persons to whom they sold were minors. This ignorance is not a sufficient excuse or justification under the act of Assembly. If such a defence could be successfully interposed in such cases, there would be few convictions and the law would be nullified for all practical purposes."

In our comments upon the liquor traffic, reported in 4 MONTG. CO. LAW R., 77, we called attention to the sale of intoxicating drink by retail dealers to be carried away in kettles. This licensee seems to have shown little respect for our opinion or comments. He says he did not make a practice of selling by the kettle, but follows up this declaration by stating that there was not much demand for sales by the kettle. With him the kettle business was limited because of a limited demand, and not from any desire to respect the wishes of the court. His grocery store-room has no direct communicating door with the bar-room, but a door from the rear of the store-room leads into the dining-room back of the bar-room. Women were in the habit of entering the store, and their kettles were taken to the bar-room by way of the intervening dining-room, and when filled with beer were returned to the store-room in the same manner. Such sales are in conflict with the spirit of the provision in the law of 1887, which declares: "No license shall be granted under the provisions of this act to any person to sell in any room where groceries are sold at wholesale or retail."

The proprietors of the iron works, for the apparent accommodation of their employes, determined to change the pay day of the men from Saturday to Friday. This was done for some little time; but it was found that some of the men indulged so freely in drink as to be incapacitated for work on the following day. During this period

In re Monaghan License.

Mr. Monaghan kept his house open for the sale of liquor during the whole of Friday night. The company was compelled to abandon the change and return to the old system. In the judgment of the court the conduct of Mr. Monaghan in this matter shows that he is not worthy to be entrusted with a liquor license. His desire to make profit induced him to violate his plain duty under the license he held. The testimony also shows sales upon credit, which is a violation of the act of 1887. Mr. Monaghan says: "They generally paid me cash. If I know them right well I will give them a drink, and they pay me some other time." When asked whether any one owed him as much as five dollars for drink, he answered, "There might be."

To forfeit or revoke this license may entail serious loss to the holder; but this must not control us in our action. In Sinott's case, 4 MONTG. CO. LAW R., 82, we said that "any violation of the law since May 13, 1887, clearly shown, will work a forfeiture of the license of the offender. In our judgment the court has no discretion; the law makes such forfeiture obligatory." Under this evidence now before us we are informed of clear violations of the law within two years, and the applicant has no one to blame but himself for the penalty he may suffer.

It is high time that persons entrusted with a liquor license should realize the position in which they stand under the law of 1887. They may not sell to minors, to a person of known intemperate habits, or to persons visibly affected by intoxicating drink. It may be difficult to observe these requirements, and for this reason it becomes necessary to exercise the greatest care in the sales of intoxicating drinks.

And now, May 5, 1890, the rule in this case is made absolute, and the license granted to Michael W. Monaghan is revoked.

Supreme Court of Pennsylvania.

ESTATE OF NINIAN IRWIN, DEC'D.

An auditor's report confirmed by the court below will not be reversed upon a question of fact except for palpable error.

The presentation of a claim before the auditor appointed to pass upon an executor's account, even if supported by some evidence, is not sufficient to toll the statute of limitations when the claim has not been adjudicated.

B, a testator, having died, A, his executor, filed an account, and an auditor was appointed to pass upon it. Certain claims against the estate were presented by A and others, which were supported by some evidence. It appearing that a judgment creditor, C, was entitled to more than the whole balance in the accountant's hands, it was agreed by all the parties in interest that all exceptions to the account should be withdrawn and the balance awarded to the said creditor. Nine years after decedent's death, further moneys belonging to the estate having come into her hands, the executor, A, filed her second account. Another auditor was appointed, and A again presented her claims, offering in support of them the report of the former audit, with the testimony attached. The auditor reported that these claims had not been proved at the first audit; and, even if they had been, as they were not adjudicated they were barred by the statute of limitations. The court confirmed this report.

On appeal, *held*, not to be error calling for reversal.

Irwin's Estate, 5 MONTG. CO. LAW R., 89, affirmed.

APPEAL of N. Adeline Irwin from the decree of the Orphans' Court of Montgomery county dismissing exceptions to the report of an auditor in said estate.

This case, as decided in the court below, was reported in 5 MONTG. CO. LAW R., 89.

G. R. Fox & Son and B. E. Chain, Esqs., for appellant.

Charles Hunsicker and George W. Rogers, Esqs., for appellee.

The opinion of the Supreme Court was delivered March 3, 1890, by PAXSON, C. J.

If the appellant had supported her claims before the auditor by competent proof, we would have had the question before us, Whether the presentation of said claim before a previous auditor in the same estate, without an adjudication thereon, tolls the statute of limitations? The auditor rejected her claims as insufficiently proved, in which he was sustained by the court below. It requires a strong case—a palpable error—to justify us in reversing both the court and the auditor upon a question of fact. We are unable to see any grounds of reversal in this case. The Baney claim of \$500, referred to in the third assignment, was not supported by so much as a scin-

Fesmire's Estate.

tilla of proof. The documentary evidence relied on to establish it was offered, but not admitted, because not proved. So much of Mr. Fox's testimony as bore upon the claim was hearsay. The auditor was right in holding there was no legal evidence in support of it. Nor are we prepared to say that there was error in rejecting the claim of the appellant referred to in the second assignment. It may be, as stated in the argument of her learned counsel, that it "was as fully proved as the nature of the case admitted." It was a very old claim, and we can readily understand how such a claim is more difficult of proof than one of recent origin. But we can not apply a more lenient rule to a claim because it is stale. On the contrary, such claims require additional caution, and the rules of evidence should not be relaxed in their favor. It is quite as easy to establish an old claim against a dead man's estate as it is to defeat it.

The decree is affirmed and the appeal dismissed at the cost of the appellants.

 ESTATE OF PETER FESMIRE, DEC'D.

Co-trustees are responsible ordinarily for their own acts and omissions but not for those of their associates. A trustee does not become by virtue of his acceptance of the trust an insurer of the trust funds against the possibility of loss, nor a surety for his co-trustee. His undertaking is personal, and requires of him good faith and reasonable diligence. If these requirements are met, he is not liable for losses occasioned by the bad faith or the crimes of his co-trustees.

APPEAL of Peter Fesmire et al. from a decree of the Orphans' Court of Montgomery county in re account filed by said appellants as two of the executors of the estate of Peter Fesmire, deceased.

Report of same case in the court below in 5 MONTG. CO. LAW R., 97.

Theo. W. Bean and W. Horace Hepburn, Esqs., for appellant.

Charles Hunsicker, Esq., for appellee.

The opinion of the Supreme Court was delivered April 7, 1890, by WILLIAMS, J.

The testator died in May, 1873. He directed his executors to convert his estate, real and personal, into money, and as to one-third

Fesmire's Estate.¹

of the proceeds to invest the same in "good real estate securities" and pay the income thereof semi-annually to his wife, Jane Fesmire, during her natural life, and after her death then over to his children or their representatives absolutely. He named his executors in these words: "I nominate and appoint my friend, Josiah Kerper, my son, Peter Fesmire, and my son-in-law, Ephraim Magargal, the executors of this my last will and testament." In June, 1875, the executors settled their account in the Orphans' Court, showing the performance of the duties imposed by the will in the sale of the property of the testator and the appropriation of the proceeds, and that they had ready for investment the one-third of the entire fund, amounting to \$7306.12, for the purpose of raising an income for the widow. This account was confirmed. The fund in hand was then invested in three mortgages, which it is conceded were "good real estate securities," and the executors held these mortgages thereafter as trustees under the trust created for Jane Fesmire by the terms of the will. Kerper lived near the widow, had been the trusted friend of the testator for years, was in active business, and apparently a prosperous man. Fesmire, the son, lived in another part of the county and at a considerable distance from the widow. Magargal lived in the state of Delaware. Both were farmers in moderate circumstances, living on and cultivating their farms. Neither of them was able to attend to the collection of the interest on the mortgages and its payment to the widow without considerable inconvenience and expense. The mortgages were therefore left in the custody of Kerper as the one of their number most conveniently situated and best qualified to act in the premises, and he undertook to collect and pay over the interest. For about ten years he discharged the duty faithfully and made prompt payment of the interest collected. In October, 1885, he failed to pay the interest falling due, and the widow at once made complaint to Fesmire and Magargal. They gave the subject prompt attention, and soon learned to their great surprise that Kerper had attempted to embezzle the proceeds of all the mortgages, and was in failing circumstances. They at once began proceedings to remove Kerper from the trust and to recover the trust funds. The widow is now endeavoring to hold them responsible for the interest which the money embezzled by Kerper should have earned if he had not gotten it into his own hands, and the court below held that they were liable

Fesmire's Estate.

to her for it, although no part of it has ever come into their hands. It is from this ruling that the appeal in this case was taken.

The general rule in relation to the liability of co-trustees is well settled in this state. They are responsible ordinarily for their own acts and omissions but not for those of their associates. So an executor will not be liable for a *devastavit* committed by his co-executor unless he has contributed in some manner to it: Br. Eq. Jurisprudence, 359. The statement of the rule by Coulter, J., in *Hall vs. Boyd*, 6 Penna. St. R., 270, is referred to by several of the later cases as the best statement of the rule to be found in our books; and it is cited with approval so recently as *Wilson's Appeal*, 115 Penna. St. R., 95. It is, in substance, that the act of one of several executors in relation to the testator's goods, as in making sale, delivering possession, or receipt of the price, is the act of all, as all have authority to do the act; but each is liable individually no further than assets have come to his hands, except for his own fraud or negligence. It may be necessary for trustees to join in executing receipts for money in many cases; but the fact that they do so join is not conclusive evidence that they are jointly liable, for in the absence of fraud and negligence each will be held liable only for what he actually receives: *Stilt's Appeal*, 10 Penna. St. R., 149; *Wilson's Appeal*, *supra*. The law requires of a trustee fidelity to the trust and the exercise of the same measure of diligence that a man of ordinary prudence may be expected to exercise in the care of his own property under the same circumstances: *Jones' Appeal*, 8 W. & S., 143. A trustee does not become by virtue of his acceptance of the trust an insurer of the trust funds against the possibility of loss, nor a surety for his co-trustees. His undertaking is personal, and requires of him good faith and reasonable diligence. If these requirements are met, he is not liable for losses occasioned by bad faith or the crimes of his co-trustees. The appellants must be judged by this standard. The trust funds in this case were invested in three mortgages. One of these was for \$4000, one for \$2500, and one for \$806.12, to which we will refer as No. 1, 2 and 3 respectively.

In October, 1883, Kerper represented to his co-trustees that the land covered by mortgage No. 1 had been sold by the owner, who wished to pay the money and have the mortgage satisfied to enable him to make title to the purchaser. He stated at the same time that he had an opportunity to loan the money again on real

Fesmire's Estate.

estate in Norristown. At his instance both Fesmire and Magargal executed an assignment of the mortgage and left it in his hands to enable him to satisfy it. He received \$4000, and instead of reinvesting it he embezzled it, but paid the interest regularly until October, 1885, to the widow. Neither Fesmire nor Magargal gave any attention to the reinvestment of this money, and both of them were ignorant of Kerper's misconduct until they discovered it after notice from the widow that she had not been paid the interest due her in October, 1885. During the two years intervening Kerper was in active business and in good repute, and as he paid the interest punctually there was nothing to call the attention of the appellants to this subject. But when they put it in Kerper's power to collect the money on the mortgage, it became their duty to see that it was again invested in "good real estate security"; and if they had not neglected this duty the loss would not have been sustained. They did neglect it. The embezzlement was made possibly because they neglected it; and their liability grows out of their negligence. We think the learned Judge of the court below was right in holding them liable for the loss of the proceeds of mortgage No. 1.

An examination of mortgage No. 2 disclosed the fact that Kerper had received the money due upon it, and attempted to satisfy it by his individual receipt. He never consulted his co-trustees in regard to the satisfaction of this mortgage; and when they discovered what he had attempted to do they promptly disavowed his act and began proceedings for the enforcement of the lien and the collection of the money, which are still pending. If the money is collected, it will be their duty to see to its investment at interest as required by the will. If it is not collected because of the fraud of Kerper, they have neither done nor omitted to do anything which has contributed to render that fraud possible, or which can make them responsible for its consequences.

Precisely the same thing is true of mortgage No. 3. The appellants knew nothing of Kerper's effort to get the money due upon it into his hands until they learned it in the course of their investigations in the fall of 1885. It was a circumstance they had no reason to anticipate, and they are chargeable with no negligence in regard to it. The arrangement under which these mortgages were left in the possession of Kerper, and he authorized to receive the interest upon them for the benefit of the widow, was, in the light of

Fesmire's Estate.

all the circumstances that led to it, a reasonable and proper one. For ten years it was a satisfactory one. It is not now alleged that it was improvidently made, or that suffering the securities to remain in the hands of their co-trustee who, equally with themselves, was entitled to their custody, was an act of negligence on the part of the appellants. There is, therefore, no reason for holding them personally liable for Kerper's embezzlement or his attempt to embezzle the proceeds of mortgage No. 3.

The wrong that has been done has been the work of Kerper alone, so far as mortgages Nos. 2 and 3 are concerned. As to No. 1, the appellants put it in his power to satisfy the mortgage and take the proceeds into his own hands, and then they neglected to perform the duty which the will imposed, viz.: to see to its investment in good real estate securities. Because of this neglect they are liable for the amount of mortgage No. 1.

Their duties as trustees require them to be vigilant and active in their efforts to recover on mortgage No. 2, and to convert into money the securities received from Kerper for the purpose of indemnifying them against his embezzlements. They must use due diligence to restore the trust funds and provide an income for the widow; but they can not be compelled to pay out money which they never received and for the loss of which they are not accountable.

A question is raised over the contract between Kerper and the appellants, bearing date March 31, 1886.

When charged with his embezzlements, Kerper put such securities as he had in the hands of his co-trustees, and by the contract between himself and them he directed in what manner the money obtained on the securities should be applied. The order of application was first to the payment of \$4000 received on mortgage No. 1, which was wholly lost to the trust unless it could be realized from the securities which he turned over under the terms of this contract; next, to the payment of the amount of mortgage No. 3, which had been received by him as the result of legal proceedings taken for its collection; last, to the payment either to the trustees or to the mortgagor, if compelled to pay the mortgage by virtue of the proceedings now pending, of the amount of mortgage No. 2. As these securities were furnished by Kerper, he had a right to direct their ap-

propriation. In the exercise of that right he seems to us to have acted properly and to have been just to his co-trustees, without the least unfairness towards his *cestui que trust*.

The wrong done by him was in the attempt to embezzle the entire fund which as trustee it was his duty to protect. The contract of March, 1886, was an effort to make amends for this wrong and restore the fund as far as the securities would reach, and the appellants have a right to apply the moneys received upon them in accordance with the terms of the contract.

The decree is reversed, and record remitted with directions to restate the account in accordance with this opinion.

DIENELT ET AL. VS. MONTGOMERY WEB CO.

Fraud being rarely provable by direct and positive testimony, great liberality is always allowed in the introduction of evidence having a tendency to show it.

In an action in which defendants alleged fraud they were obliged to get their testimony from the other side, and were not able to make direct and positive proof of the fraudulent intent, but had to rely upon circumstances pointing thereto. The court in its charge treated the items of evidence one by one, without at any time directing the view of the jury to their united force. *Held*, to be error.

Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed on the market.

A corporation can not escape its obligations by changing its name or assuming the form of a new corporation.

ERROR to the Common Pleas of Montgomery county.

Reported in the court below in 5 MONTG. CO. LAW R., 9.

Childs & Evans, Esqs., for plaintiffs in error.

J. P. Hale Jenkins, Esq., for defendants in error.

The opinion of the Supreme Court was delivered March 31, 1890, by MITCHELL, J.

Two questions are presented in this case: first, whether the transfer from the Aronia Company to plaintiffs was fraudulent in fact, as against the appellants; and secondly, whether it was fraudulent in law.

On the first question the verdict of the jury was in favor of the good faith of the transaction; but, unfortunately, it is without weight,

as it was rendered under a charge which scarcely permitted any other result, and which was justly open to the exceptions taken to it. Fraud, as has so often been said, can rarely be proved by direct and positive testimony, and great liberality is always allowed in the introduction of evidence having a tendency to show it. "When creditors are about to be cheated," says Chief Justice Black in *Kaine vs. Weigley*, 22 Penna. St. R., 183, "it is very uncommon for the perpetrators to proclaim their purpose and call in witnesses to see it done. A resort to presumptive evidence, therefore, becomes absolutely necessary to protect the rights of honest men from this as from other invasions." The present case followed the usual course. Defendants, who had to get their testimony from the other side and from circumstances, were not able to make positive and direct proof of the fraudulent intent, but had to rely upon circumstances pointing thereto. In his charge the learned Judge took these up seriatim and disposed of them summarily in the passages assigned for error, as follows: "What facts are before you to show that there was any fraud in this transaction? The mere fact that they (appellants) were not provided for would not of itself be fraud. Now it appears that a paper was drawn up and signed by all the creditors except these particular parties. This was a perfectly legal transaction. If this transferring was not done for the purpose of defrauding these particular creditors, it was perfectly proper." And again, "Now the facts and circumstances related here to show fraud are, first, that they (defendants) were not thus provided for; and in the second place, certain declarations made by the president * * * in an affidavit * * * (the jury) must determine from the facts before them, and from all the inferences to be drawn from these facts. Because defendants may lose their claim is not evidence that they were intended to be defrauded." This was not an adequate presentation of the case. It omits all mention of the facts that the failure to provide for defendants, to include them in the paper, or to give them notice of the proceeding, was intentional, always a cardinal point in the proof of fraud; and it makes no reference to the removal of the Aronia Company's goods without leaving enough to pay even the rent, to the fact that the transfer was made on the eve of a trial which was sure to result in a judgment in favor of appellants, and perhaps to other circumstances of suspicion. But the substantial defect of the charge is in its treatment of the items of evidence one

by one without at any time directing the view of the jury to their united force. There probably never was a case of circumstantial evidence that could not be blown to the winds by taking up each item separately and dismissing it with the conclusion that it does not prove the case. The cumulative force of many separate matters, each perhaps slight, as in the familiar bundle of twigs, constitutes the strength of circumstantial proof. This presentation of the case to the jury we unfortunately do not find anywhere, and for want of it we are obliged to sustain the third, fourth and fifth assignments of error.

But secondly, was this transfer fraudulent in law? Here again the true point of the case has been unfortunately overlooked. The question is stated in the opinion of the court to be whether a corporation can lawfully dispose of its assets without the assent of all its creditors, there being no actual fraud intended; and this is the question that has been argued here by appellee. But it is only half the question, and the pinch of the case lies in the omitted portion, Can the stockholders of a corporation make such a transfer *to themselves*? The Montgomery Company is substantially the Aronia Company under a new name. More than half its stock is held by the old stockholders by virtue of their ownership of the old stock, without any other consideration. On the view of the question that appellees assume to be contended for, they have argued that the same law as to the use of its assets to pay its debts should be applied to a corporation as to an individual, even to the extent of sanctioning preference; and this might be conceded without really touching the case. But the illustration, if appropriate, is fatal to the appellee, for in the case of an individual a transfer to his wife or his agent, or anybody who should merely represent himself under another name, would be unquestionably void against creditors. The only real difficulty in the present case is whether the stockholders are so completely severed in the view of the law, from the corporation behind which they hide, as to prevent a creditor from asserting their identity in fact for the purpose of securing payment out of property which was theirs under one name, and is still theirs under another. Is the Montgomery Company so completely a new and different person from the Aronia Company that the law must close its eyes to the fact that the difference is a mere juggle of names? We do not think there is any compulsion to such legal blindness. Set-

Dienelt et al. vs. Montgomery Web Co.

tled general principles and the analogies of the law are against such a contention. If the corporation had merely changed its name there could have been no doubt of the continued liability of the property. As already said, a majority of the stockholders in the new company are simply the stockholders of the old company holding as such and without other consideration. As to these it has been a mere change of name. As to the other, or new stockholders, it appears from the agreed facts that they were creditors of the old company, and hold their present stock solely in consideration of their former claims as creditors. They paid nothing else for it, and they must have known that the new corporation into which they entered in this way was not a new enterprise in the regular course of business under the incorporation act of 1874, as it professed to be, but a new turn in the old enterprise, all of whose property was being practically handed over not to them alone in payment, which they might perhaps rightfully have accepted, but to them in conjunction with their late debtors. Under such circumstances they were bound to take notice of the nature of the transaction, and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all, and the new stockholders were not innocent, for they knew or were bound to take notice of the taint in their co-adventurers' title. We are of opinion that as to the stockholders in the Aronia Company this was a transfer of property by a debtor with the retention of an interest in himself, within the settled rule of law that makes such transfers void against creditors; and that as to the Aronia creditors who became new stockholders in the Montgomery Company, they took with such notice as prevents them from claiming now as innocent holders for value against the appellants as execution creditors of the old corporation. It is not worth while to cite authorities for these principles. They are settled and familiar. The only question that can be made is upon their application, and the novelty in this, if there be any, is simply a novelty of circumstances. The only case of similar facts that has been found is *Hibernia Insurance Co. vs. St. Louis and N. O. Transportation Co.*, 13 Fed. Rep., 516, and in

that the Circuit Court of the United States reaches a similar conclusion. "This court holds," says McCrary, C. J., "that the sale by the Babbage Company of all its property to another corporation composed mostly if not wholly of the same persons, was fraudulent and void as to all creditors of the former company, not assenting thereto. The fair inference from the transaction is that the old company was about to be dissolved and cease to be. It was to be absorbed by the new company. This is the inevitable consequence of the formation of the new company composed substantially of the same persons, to transact the same business at the same place, and with the same property. By the transfer the creditors of the old company were deprived of the means of enforcing their claims.

* * * Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed on the market." And Treat, D. J., added, "A corporation can not change its name, or assume the form of a new corporation, and thus escape its obligations." The court drew a distinction between an individual and a corporation as to parting with all its assets, even for the payment of *bona fide* debts, and not only held the transfer void, even irrespective of the identity of the stockholders, but held the new corporation liable to the creditors of the old to the extent of the assets so received. It is not necessary for us to go so far. We only hold that under the circumstances specific property of the old corporation may be followed as in other cases of transfers fraudulent as to creditors.

It is said in appellee's argument that the whole of the property of the Aronia Company was not sold. But in fact the portion left was not enough to pay the landlord's preferred claim for rent, and as to this creditor the transfer was of all the available assets, and left him nothing within reach for the payment of his claim.

Judgment reversed, and now judgment for defendants on the point reserved.

Court of Common Pleas of Montgomery County.

NATIONAL BANK OF ROYERSFORD VS. CYRUS H. DAVIS.

A promissory note payable with interest is negotiable paper.

The negotiability of a note is not destroyed by adding to it a statement showing that the note was given for a machine, the title to which should remain in the payee until the note was paid.

An amendment will be allowed under the act of 1852, P. L. 574, which simply adds the name of a party as legal plaintiff.

MOTION to dissolve foreign attachment.

Hallman & Place, Esqs., for plaintiff.

George N. Corson, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., June 2, 1890.

The petition of the defendant sets forth that he is the surety for one Maurice Bowman upon the note in suit, and that the action can not be maintained until the property of the principal is first exhausted. There is nothing before us to sustain this allegation. The obligation is the joint and several note of the defendant and said Bowman. Even if there were any merit in the application, the defendant can not avail himself of this defence at the present stage of the proceedings.

It is further alleged that the plaintiff can not maintain this action, as the note is not negotiable.

The note is made payable to Y. C. Freed & Co., who endorsed the same over to the plaintiffs.

The note in suit reads as follows:

"No. \$320.

Royersford, Oct. 29, 1888.

"Ninety days after date we or either of us promise to pay to the order of Y. C. Freed & Co., Royersford, Pa., three hundred and twenty dollars, payable at the National Bank of Royersford with interest without defalcation for value received.

"This note is given for a two-horse power thresher and cleaner received of said payees, the title to which is to remain in them until this note is paid, and upon such payment the title shall vest in the undersigned; and if at any time the said payees or their agents shall

National Bank vs. Davis.

deem themselves insecure, it shall be lawful for them to enter my premises or any other place and take possession of said machine. And I agree to pay for the use of and damages to the machine.

"My post-office address is Port Kennedy, Pa.

"Maurice Bowman.

"Cyrus H. Davis."

(Endorsed) "Y. C. Freed & Co."

We think this is a negotiable instrument. The added clauses are but additional securities for the payees; the note is still an unconditional promise to pay a certain sum of money to the payees at a time therein limited. The stipulation for the payment of interest does not destroy the negotiability of the paper: *Zimmerman vs. Anderson*, 67 Penna. St. R., 421. In the case just cited the court refer to *Hodges vs. Shuler*, 22 N. Y., 114, with approval, where it was said, "We are of opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day, and although an election was given to the promisees upon a surrender of the instrument six months before its maturity to exchange it for stock, this did not alter its character or make the promise in the alternative in the sense in which that word is used respecting promises to pay." In *Mott vs. Havana National Bank*, 22 Hun, 354, a statement to the following effect did not destroy the negotiability of the paper: "being in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is fully paid."

Whether we are right in this view or not is immaterial, for the plaintiff asks leave to amend the record by adding as legal plaintiff Y. C. Freed & Co., so that the caption may read "Y. C. Freed & Co., to the use of the National Bank of Royersford, Pa., vs. Cyrus H. Davis." Such amendment, by adding a legal plaintiff, is allowable under the act of 1852, P. L. 574: *Patton vs. Railway Co.*, 96 Penna. St. R., 169.

And now, June 2, 1890, the amendment is therefore allowed as prayed for, the motion to dissolve the attachment is refused, and the rule is discharged.

MILTON S. WOOD vs. THE BURGESS AND TOWN COUNCIL OF THE
BOROUGH OF BRIDGEPORT.

The plaintiff's horse was injured by falling in the night-time into a trench extending across a public street in a borough. *Held*, that inasmuch as no barriers were placed across the street so as to shut it off from travel, it was a matter for the jury to determine, under a conflict of testimony, whether sufficient lights were placed to warn the public that the street was not passable, and whether the plaintiff was guilty of contributory negligence in driving into the trench under the circumstances.

MOTION and reasons for a new trial.

Hallman & Place, Esqs., for plaintiff.

Henry Freedley, Jr., Esq., for defendant.

Opinion of the court by SWARTZ, P. J., June 2, 1890.

Front street in the borough of Bridgeport is intersected by Green street. A trench or drain was dug along Green street and across Front street. The Fame Building and Loan Association, owners of the market-house, dug this ditch to drain the cellar of the market-house. The ditch or trench was filled with loose dirt, and carriages passed over it along Front street. On Sunday, the 15th of September last, a heavy rain fell about noon of that day. By reason of the rain the loose dirt in the trench settled down or was washed out. The trench was from two to three feet wide, and after the rain it had a depth of from two to two and a half feet. It was partly filled with slush and water.

Front street by reason of the condition of the trench was impassable for carriages after the washout on the afternoon and night of September 15th. The Burgess saw the trench about four o'clock of that day and a borough policeman saw it soon after the rain. When the Burgess viewed the trench the borough street commissioner was present, as was also Mr. Hess, the representative of the building association. The Burgess directed them to put up lights, and saw the lights after they were put up. He testified further: "I told Mr. Hess that they had better get something and put across the street, and then they would have to put lights on it. * * * I did not direct specially that they should put anything across. I directed them to put lights on the street, and he went right away to get them, and I suppose he did put them there. I thought it would have been as well to have had something across the street, because some fellow who did not know anything might come along there and drive in—might not see it."

The street commissioner saw the lights after they were put up and before the accident. It thus appears that the borough authorities had full knowledge of the dangerous condition of the street and of the manner in which the signals of danger were placed.

If the street was not passable the proper way to protect the public was to shut it off from travel instead of inviting passage over it. We left the question to the jury whether the barriers were sufficient, and instructed them, even if they were not sufficient, that there could be no recovery if the authorities did what was reasonable under the circumstances, taking into consideration the time they had in which to do the work and also the fact that the work had to be done on the Sabbath day. We went even a step further and instructed the jury that the guards were sufficient if placed as contended by the defendant, although the street was not shut off from travel.

This instruction was as favorable to the defendant as the facts in evidence warranted. The erection of a barrier across the street so as to shut off travel would seem to require no greater labor than the planting of poles or stakes in the trench. That the street was not passable for horse and carriage is clear from the facts in evidence.

Were the two stakes placed on the west side of the street near the curb line; and, if so, was the plaintiff guilty of contributory negligence in attempting to pass along the east side of the street? This was the principal question submitted to the jury. The evidence as to the location of the stakes was conflicting. The driver of plaintiff's horse says: "The lights were on the right hand side of the street, near the right curb; the first was not more than a foot or so from the curb I do not think and the other was about four feet from it, and they were pointing toward the right hand side." Other witnesses for the plaintiff bring the poles or stakes farther from the west curb, but they add that the stakes were inclined to the west at an angle of forty-five degrees and the lights were suspended from the ends of the poles. Charles Johnson, one of these witnesses, says: "The lights were on the right hand, were leaning towards Second street, towards Green street; they were standing on a slant and pitched up towards Second street. These parties drove across in the opposite direction from the ways the lights pointed. * * * The way the lights were put I would have drove the same side this man drove, because I would have thought the danger was on the

Costello vs. Borough of Conshohocken.

other side." According to the plaintiff's evidence the lights did not cover the east side of the street,—that is, the lights did not disclose any danger on that side of the street. One of the witnesses says there was no light on the left side, "and it looked as if carriages had been going past." Another says, "The ditch was full of dirt and water and looked like smooth road," "very much like the road to my sight."

Under the whole evidence the jury might have found that the lights were properly located across the street; but they saw fit to adopt the plaintiff's version, and we can not say that this was error. If the lights were on one side of the street pointing away from the danger, it was for the jury to determine whether it was negligence on the part of the plaintiff to use a street open to travel and to pass along the side of the street where the signals seemed to indicate the way. We said it was sufficient if the lights were placed from eight to ten feet from the curb on each side of the street, as contended by defendant; but to hold as a matter of law that the stakes and lights were sufficient if located as claimed by the plaintiff, was to say in effect that the signals were sufficient no matter where they were located in the street. Where no barriers are put up a traveler, ordinarily, has a right to treat the street as open to public travel. Whether a street is sufficiently guarded, and the existence and location of the lights, are matters for the jury where there is a conflict of evidence: *Electric Light Co. vs. Gardner*, 24 W. N. C., 21.

And now, June 2, 1890, the motion for a new trial is refused and the reasons are dismissed.

COSTELLO VS. BOROUGH OF CONSHOHOCKEN.

If by the neglect of a municipal corporation water is unlawfully thrown upon the land of A, he can not in turn cast it onto the land of B, so as to give the latter a cause of action against the corporation.

In a suit against a borough where the pleadings show that the cause of complaint was the result of inadequate gutters, curb-stones, etc., the plaintiff can not recover. In such case a plaintiff can not, under the pleadings, recover even if the evidence shows that the damage resulted from a change in the bed of the street.

Charles Hunsicker, Esq., for plaintiff.

James B. Holland, Esq., for defendant.

Opinion of the court by WEAND, J., May 13, 1890.

Fourth and Third avenues are parallel streets in the borough of Conshohocken. Plaintiff owns a lot on Third avenue separated from John Delaney's lot on Fourth avenue by an alley. The testimony shows that for years the surface water from Fourth avenue, an ungraded street at that point, has flowed onto Delaney's land. To keep the water from his premises Delaney dug a ditch to carry the water to the alley, from whence it flows onto plaintiff's land. Plaintiff brings trespass against the borough to recover damages for the injury she has sustained.

If the borough was in fault in throwing the water onto Delaney's land, he in turn could not divert it onto plaintiff's property. The defendant did not cause it to flow onto plaintiff's land, and hence she had no cause of action.

Her cause of complaint, as set forth in the statement filed, is that said defendant is a municipal corporation, and has the duty of maintaining the streets, lanes and alleys of said borough; that the surface water from Fourth avenue in said borough is unrestrained by any sufficient curb-stone or gutter, or both, and the surface water from said street flows in, upon and over the property of plaintiff, and has been so doing for the last ten years and still does, by means whereof, etc. The gist of the action was the neglect of the borough in not providing proper drainage.

That a municipality is not liable for the flooding of private property from the inadequacy of gutters, drains, culverts or sewers, was decided in *Fair vs. City of Philadelphia*, 88 Penna. St. R., 309; *City of Allentown vs. Kramer*, 73 Id., 406; *Lafferty vs. Girardville Borough*, 1 Mona., 513.

To support her case and take it out of the above rule, plaintiff without objection introduced testimony to show that in the building of new houses on Fourth avenue a cartway had been made upon the street, and that from these buildings and the cartway more water now flows onto her land than before. This evidence was not pertinent to the issue, and plaintiff could not thus change or enlarge her cause of action as set forth in her statement. Besides, the evidence does not show distinctly who made the cartway or that it changed the flow of the water. It was not such an act, even if done by defendant, causing a change of grade or of the street as to make the defendant liable.

And now, May 19, 1890, motion to take off non-suit overruled.

IN EQUITY.

THE CHESTNUT HILL AND SPRINGHOUSE TURNPIKE ROAD COMPANY
VS. THE PENNSYLVANIA RAILROAD COMPANY.

The court will not enjoin by preliminary injunction a railroad company in the construction of an overhead crossing over a turnpike road on the ground of an insufficient headway, where the weight of the evidences as disclosed by the affidavits shows that such headway is ample.

A railroad company, in the location and construction of its road, may, under the right of eminent domain, take and occupy a portion of the bed of a turnpike road; but a necessity for such occupancy must exist.

Where there is an attempt to occupy the bed of the road and supply the part taken by devoting other ground to public use, it is only necessary to show that it is not *reasonably practicable* to cross the highway and construct the railroad without such occupancy.

RULE to show cause why a preliminary injunction should not be awarded.

Opinion of the court by SWARTZ, P. J., June 14, 1890.

The plaintiff is a turnpike road company chartered by the state March 5, 1804, and alleges that it laid out and operates a road sixty feet wide "except where old houses stood and still stand." The defendant company in the construction of its railroad proposes to cross said turnpike diagonally by an overhead structure, leaving a passageway fourteen feet high above the grade of the turnpike. At least one of the abutments of this structure will rest upon the sixty feet roadway of the plaintiff.

The complainant alleges, first, that a clear headway of fourteen feet is insufficient; and, secondly, that the defendant company has no right to occupy any part of said roadway, and has shown no necessity for such occupancy.

The affidavits produced before us by the defendant show that the proposed headway of defendant's structure is greater than that ordinarily provided in bridges and other structures crossing the highways of our county. Men of practical knowledge, experience and observation declare that a passageway fourteen feet high is ample, even for the large loads of hay that may be carried over this turnpike. The weight of the evidence upon this question is with the defendant, and under such circumstances we can not exercise the strong arm of the law by awarding a preliminary injunction.

A railroad company, in the location and construction of its road, may, under the right of eminent domain, take and occupy a portion of the bed of a turnpike road. But the *necessity* for such taking must exist. Property devoted to public uses, including franchises, is subject to eminent domain, and may be taken for other public uses when the necessity arises for such taking: *Phila. & Trenton R. R. Co.*, 6 Wh., 25; *Penna. R. R. Co.'s Appeal*, 93 *Penna. St. R.*, 150; *Pittsburg Junction R. R. Co.'s Appeal*, 122 *Id.*, 511. Especially is this true where such taking will not destroy, but only incidentally interfere with existing franchises without substantially impairing existing public rights or uses.

Again, under the thirteenth section of the general railroad act of 19th February, 1849, the site of a turnpike or public road may be changed even for the purpose of securing a proper crossing over the road, without occupying any part of the road-bed longitudinally. Whether it is "reasonably practicable" to construct the railroad without interference with the highway, is the only test in such cases: *Penna. R. R. Co.'s Appeal*, 24 *W. N. C.*, 412.

The defendant claims the right in this case to occupy part of the plaintiff's road-bed, and contends that it has fully supplied the part taken by devoting to public use at this point other ground purchased by it; that such taking, when supplied by other land, will not in any way interfere with the public travel on the turnpike.

Where the railroad company seeks to change the site of a highway and supply the part taken, the company need not, it would seem, show that absolute necessity for such taking and occupancy that is required where such company under other circumstances seeks to appropriate or interfere with the franchises of another corporation by exercising the right of eminent domain. In the latter case the "necessity must arise from the very nature of things over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy": *Pittsburg Junction R. R. Co.'s Appeal*, *supra*.

The most favorable view we can take of the defendant's case requires us to hold that it is not "reasonably practicable" to build the proposed railroad without occupying the plaintiff's road-bed. But how can we reach this conclusion without a fact before us to sustain it? Not a single reason is assigned for such occupancy. The affidavit of Mr. Tripler alleges that "it is necessary because of the

Turnpike Co. vs. Railroad Co.

alignment of the defendant's road." But in what way does the alignment prevent the spanning of the entire roadway?

The state authorized the plaintiff company to take sixty feet for its turnpike. The commonwealth must have deemed such width necessary for the proper construction and operation of the road. The plaintiff, by the bill and affidavits filed, alleges that the road is surveyed, located and operated of a width of sixty feet. In the judgment of the turnpike company the sixty feet were necessary. The railroad company proposes to occupy twelve and one-half feet of the roadway on the east side for its abutment. The plans put in evidence by the respective parties do not agree, but we think they disclose enough to indicate that the other abutment will occupy about eight feet of the road-bed on the west side. The Skippack turnpike and the Camp Hill road enter the plaintiff's highway at the point of the proposed railroad intersection. That the plaintiff's road at this point is extensively traveled, and will continue to have such travel, can not be doubted. Under such circumstances we can not allow one corporation to take the lands of another and interfere with its franchises. Some ground for such action should be furnished other than the mere allegation that the appropriation will not interfere with plaintiff's road. Such allegation does not show a clear necessity for the occupancy, nor does it show that the spanning of the road-bed is not "reasonably practicable." If it is shown hereafter that such necessity does exist, or that there is a real difficulty in the way to span the entire road, then the injunction now awarded can be dissolved.

We may add that it is not clear to us from a reading of the act incorporating the plaintiff company that houses standing at the time of the original survey of the road could be included in such survey, or that the ground occupied by them could at any time thereafter become part of the road-bed by reason of such original survey.

And now, June 14, 1890, the rule for a preliminary injunction is made absolute and a preliminary injunction is awarded as prayed for, to continue until final hearing or the further order of the court, the plaintiff to give bond in \$3000.

JOHN C. LYNCH ET AL. VS. HARRISON ALDERFER.

A justice of the peace has no jurisdiction in an action of trespass on the case to recover damages from the master for the negligence of the servant.

The act of May 25, 1887, P. L. 271, does not extend the jurisdiction of justices of the peace; it abolishes the distinction heretofore existing between trespass *vi et armis* and trespass on the case only so far as it relates to procedure.

EXCEPTIONS on certiorari to M. B. Linderman, justice of the peace.

Opinion of the court by SWARTZ, P. J., June 2, 1890.

The exceptions which relate to the irregularities of the service and return by the constable are not sustained. The defendant appeared at the hearing and made his defence. If there was any irregularity, it was waived by such appearance.

The sixth exception is sustained. The justice had no jurisdiction in the case. The transcript discloses that the action was brought to recover damages for negligence. The plaintiff claimed four dollars and ninety cents "for damage done to his wagon by reckless and careless driving on the part of the driver of defendant's team."

A justice of the peace has no jurisdiction in an action of trespass on the case: *Hill vs. Township of Tionesta*, 129 Penna. St. R., 525. It is said in 1 Ch. Pl., 127, that where a person drives a horse and carriage against another or his property, the injured party has an election either to treat the negligence of the defendant as the cause of the action or to consider the act itself as the injury. We think the transcript discloses a proceeding to recover damages for negligence; nor do we see how any other proceeding could be maintained. The action is against the defendant to recover damages for the negligence of the servant of defendant. If the master is liable in such a case, it is by reason of the servant's negligence; the action, therefore, is trespass on the case: *Wright vs. Wilcox*, 19 Wend., 343.

The act of May 25, 1887, P. L. 271, abolishes the distinction heretofore existing between trespass *vi et armis* and trespass on the case only "so far as it relates to procedure"; it does not extend the jurisdiction of justices of the peace.

And now, June 2, 1890, the sixth exception is sustained and the proceedings of the justice are set aside.

Dobson vs. R. R. Co.

IN EQUITY.

JOHN DOBSON VS. PENNSYLVANIA SCHUYLKILL VALLEY RAILROAD CO.

Construction of act of June 14, 1871, P. L. 1360. Method of procedure under said act.

1. The act of June 14, 1871, P. L. 1360, which requires the court to examine, &c., whether a corporation possesses the rights or franchises to do the act from which it is alleged injury will result to private rights or to the rights or franchises of other corporations, contemplates a course of proceedings analogous to the ordinary equity proceedings.
2. On a motion for an injunction under said act to restrain a railroad company from condemning land, the plaintiff alleging that the defendant company was not constructing its road for public trade or travel, but merely for private trade, the court will not do more in the first instance than require defendant to establish a *prima facie* right to do the act complained of.
3. Where it appears, by the affidavit of the president of the defendant company and the resolution of the board of directors, that the road is being built for public trade and travel, which is denied by the plaintiff, the court will not grant a preliminary injunction.

MOTION for an injunction.

James Boyd, Esq., for plaintiff.*Charles H. Stinson and Wayne MacVeagh, Esqs.*, for defendant.

Opinion of the court by WEAND, J., June 14, 1890.

The bill of plaintiff complains that the Pennsylvania Schuylkill Valley Railroad Company and its lessee, the Pennsylvania Railroad Company, are about to construct a railroad over his property; and claiming that his private rights are invaded and injured by the defendants, he prays the court to examine, inquire and ascertain whether said defendants do in fact possess the right or franchise to do the acts complained of. The proceeding is under the act of June 14, 1871, P. L. 1360, and it is the duty of the court to make such inquiry as will satisfy us that defendants are engaged in a lawful enterprise.

On a motion for a preliminary injunction it is not necessary that we should do more than require the defendants to establish a *prima facie* right. This being done, the case follows the usual course to final hearing. The act contemplates a course of proceeding in all respects analogous to the ordinary equity proceeding, and was evidently intended to give private persons the right to contest those acts which theretofore were only inquirable into by the Attorney General or by *quo warranto*.

The defendants being required to show cause file their affidavit and resolutions, from which it appears that the Pennsylvania Schuylkill Valley Railroad Company was chartered under the general railroad laws of the state, and has constructed its road from Philadelphia to a point beyond Pottsville. In the opinion of the officers of the company a branch road became necessary to extend from the main line to the Pencoyd Iron Works, at West Manayunk, and accordingly several resolutions of the board of directors were passed, authorizing the branch or road here complained of.

Plaintiff contends that this construction will not be such a branch road contemplated by the acts of 1849, 1868, or their supplements; that it is not intended for public trade and travel, and that public travel can not be safely accommodated. And that being, therefore, only intended for private trade, defendants are not authorized to occupy his land under the power of eminent domain.

The only evidence before us directly bearing upon the question is contained in the affidavit of Mr. Du Barry, President of the Pennsylvania Schuylkill Valley railroad, on the one hand, and that of the plaintiff, Mr. Dobson, on the other.

The former swears that the road is to be constructed for public trade and travel and to accommodate a population of two thousand people at Pencoyd; whilst Mr. Dobson testifies to the contrary, and points to the elevation and character of the country and method of construction to sustain his allegation. As was said by the Supreme Court in Penna. Co.'s Appeal, 128 Penna. St. R., 509, "it is difficult to set any limits to what is possible to engineering skill and money in this age of marvels." The defendant company claim to be able to construct their road in the manner proposed and for the object stated. If we now restrain them we render it impossible for them to show the feasibility of their plan or the *bona fides* of their conduct. When a company in apparent fairness undertakes a work of this character involving large outlays of money, we should presume that they have carefully considered their power to accomplish the end proposed. It would also be out of place for us upon the mere affidavit of plaintiff, to decide that the defendants' engineers are entirely wrong in their project to build the road on the proposed site that will accommodate the public with safety. Nor can we thus summarily decide that it is not intended for public trade and travel, in the face of the decision of the board of directors and the affidavit of the

President. Why is it not for the public with a population of two thousand persons living at or near these works, if they desire it? The main object may be to secure the trade of the iron works; but the very fact that the works has trade sufficient to induce a railroad company to construct an expensive branch to reach it, is also evidence to our minds that it attracts the public to its vicinity. An operation of this kind, employing about sixteen hundred persons, soon and necessarily is surrounded with stores, shops, and other industries attracted to it by the necessities and demands of every-day life, requiring railroad facilities.

Nor do we attach much significance to the fact that several locations have been fixed upon. Every one thus far has been contested; and it may be that this is the only one that can be secured without doing greater damage to other persons or corporations. The question as to which shall be the final one is not now before us. It sufficiently appears that resolutions for the construction of this branch over plaintiff's land were passed September 5, 1889, November 11, 1889, and April 23, 1890, and that nothing appearing at this time to impeach the *bona fides* of the transaction or to show that the defendants are not acting according to law, we can not as we now view the matter restrain the work.

Nothing that we have here said in any manner conflicts with the decision of the Supreme Court in the case of Edgewood R. R. Co.'s Appeal, 79 Penna. St. R., 257. In that case a private corporation or company, to accommodate their own business, undertook to construct a railroad under guise of a railroad charter, and they were properly restrained from exercising the right of eminent domain. If the Pencoyd company were doing the work complained of here, the result might be the same. But this is not the case. We have here a regularly chartered and constructed railroad company endeavoring, if their allegation is true, to accommodate the public and increase its own business by the building of a branch road, and this the law allows. If on final hearing or hereafter it shall properly be made to appear that this is not the *bona fide* purpose of the act, the plaintiff will have his remedy and relief.

And now, June 14, 1890, an injunction is refused.

WM. F. SOLLY, RECEIVER OF THE SCHUYLKILL VALLEY MUTUAL
FIRE INSURANCE COMPANY OF NORRISTOWN, VS. REMANDUS
SCHEETZ.

In a suit by a receiver of a mutual fire insurance company to recover an assessment on a premium note to pay fire losses and other debts of the company, the defendant may interpose by way of set-off a demand due him from the plaintiff company if such demand was payable prior to the appointment of a receiver and there is no allegation of the company's insolvency.

MOTION for judgment for want of a sufficient affidavit of defence.

J. A. Strassburger, Esq., for plaintiff.

J. P. Hale Jenkins, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., June 16, 1890.

The defendant took out a policy of insurance in the plaintiff company, and in consideration gave his promissory note for \$240, commonly called a premium note, payable at such times and in such proportions as the directors of the company under the constitution and by-laws may require.

Prior to the issuing of this policy the defendant held a perpetual insurance in the same company. He deposited \$62.50 upon condition that such deposit money should be returned to him, less five per centum, whenever he demanded a cancellation of the policy. He demanded such cancellation and return premium, but before it was paid the company went into the hands of a receiver. An assessment was duly levied upon the premium note under the application of the receiver. By reason of such assessment there was due from the defendant on his premium note \$108. He now claims the right to set off said demand by the amount due him as return premium under the perpetual insurance contract.

The company owes other return premiums on perpetual policies, and the assessment on the premium notes was made to cover this class of debts as well as losses by fire and other obligations of the company. There is no allegation of insolvency; but, on the contrary, the assets of the company are apparently more than sufficient to pay all debts.

We fail to find any good reason for disallowing this set-off. A demand due to the defendant may be interposed by way of set-off

Solly, Receiver, &c., vs. Scheetz.

to a receiver's action. "The general principle governing this subject seems to be, as regards demands or choses in action, in favor of the original party over whom a receiver is appointed, that the receiver takes such choses in action subject to any equitable set-offs which defendant might have urged against the original party holding the legal title": High on Receivers, Sect. 247. Who will be injured by allowing such set-off. Unless we assume that the company is insolvent, the defendant is sure to receive his return premium under the contract. The receiver would be compelled to pay it to him out of the assets of the company, for that was one of the purposes for which the assessment was ordered. In *Lawrence, Receiver, vs. Nelson*, 21 N. Y., 158, such set-off was disallowed because the company was a mutual insurance company and insolvent. It was said the premiums constitute a fund for the benefit of all creditors, and the defendant is bound to take a pro rata dividend from such fund, and can secure no preference over other creditors by reason of his being also a debtor. See also *Hillier vs. Ins. Co.*, 3 Penna. St. R., 470. The reason, we perceive, for the disallowance is based entirely upon the admitted fact of insolvency. But, as already stated, we can not treat the plaintiff as an insolvent company. The papers before us do not disclose any insolvency, nor is there a word or fact to indicate it. The set-off is not allowed where there is an obligation upon all creditors to share the loss pro rata. Where there is no loss no such obligation arises.

And now, June 16, 1890, the motion for judgment for want of a sufficient affidavit of defence is overruled, but the plaintiff may have judgment for the amount of his claim less the set-off claimed by the defendant.

Vol. VI.—27.

IN EQUITY.

SEBASTIAN A. RUDOLPH VS. THE PENNSYLVANIA SCHUYLKILL VALLEY
RAILROAD COMPANY.

Where the affidavits on behalf of the railroad company show that the construction of a branch railroad is for the accommodation of the trade and travel of the public, the court will not restrain by preliminary injunction such construction upon the allegation of complainant that such branch is a private road for the traffic and trade of certain iron works.

Where the railroad company tenders a bond for land to be taken, the court will not in an application for a preliminary injunction treat such taking as a second location and an abandonment of the prior location, when the complainant alleges such abandonment and the defendant denies it.

MOTION for a preliminary injunction on amended bill filed by plaintiff.

Charles Hunsicker, Esq., for plaintiff.

Charles H. Stinson, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., June 30, 1890.

The allegation of the complainant that the proposed branch road is in fact but "a private road for the traffic and trade of the Pencoyd Iron Works," is denied by the affidavits of the defendant company. In support of such denial copies of the resolutions passed by the board of directors of the company are filed of record. These resolutions set forth that the purpose of the proposed branch road is "to accommodate the trade and travel of the public."

With this denial thus supported it would be improper to use the strong arm of the equity process and interfere by a preliminary injunction. In a similar application, *Dobson vs. Railroad Co.*, 6 MONTG. CO. LAW R., 109, Judge Weand refused a preliminary injunction after a full discussion of the questions raised in the issue now before us, and we refer to that opinion as an answer to plaintiff's complaint.

In the fifth paragraph of the amended bill the plaintiff alleges that the defendant company made a prior location of the proposed branch and gave bond, which was approved. And in the next paragraph he denies the right of the company to make a change of location after a prior location has become final by the approval of the bond.

The affidavits of the defendant, the plans and drafts in evidence, show that there is no change from the prior location so far as the lands of the complainant are concerned. To construct the branch as now contemplated it will be necessary to appropriate the strip of

Brunner's Estate.

plaintiff's land already bonded as well as the additional strip for which a bond is now tendered. The prior taking was necessary for the construction of a section of the branch road west from the ground which the company now seeks to acquire;—that is, the strip of land heretofore condemned and the strip now in question from different sections in the construction of the same branch road.

The company is bound by these plans and drafts of record in the different condemnation proceedings; therefore, as the matter now stands before us, we are not called upon to decide whether a railroad company may make a second location and abandon a prior location after the bond for such prior taking is filed and approved. If we were to hold that such second location is unlawful it will not help the plaintiff at this stage of the proceedings, for the evidence of an abandonment and new location now before us is insufficient to support a preliminary injunction.

And now, June 30, 1890, the rule for a preliminary injunction is discharged and the injunction is refused.

Orphans' Court of Montgomery County.

ESTATE OF SAMUEL BRUNNER, DEC'D.

An auditor's finding of facts is entitled to much weight; but where such finding is unsupported by the evidence, it is set aside.

Before a wife can recover as a creditor against her husband's estate for money loaned, she must show that her money passed over to the husband. The burden is upon her to establish this fact fully and clearly.

EXCEPTIONS to the report of the auditor.

Charles Hunsicker, Esq., for exceptions.

Wm. F. Dannehower, Esq., contra.

Opinion of the court by SWARTZ, P. J., March 3, 1890.

The widow of the decedent presented a claim against her husband's estate for money loaned to him. The auditor sustained her claim to the extent of five hundred dollars. This amount he awarded to her.

Does the evidence offered sustain her claim? We can not agree with the auditor. The testimony clearly shows that Mrs. Brunner had a separate estate of seven or eight hundred dollars. She received this money from her father's estate; but we fail to find

Brunner's Estate.

any facts in evidence which show that the husband received this money from her.

Mr. Brunner was the owner of a house at the time of his marriage. Soon after his marriage with the claimant, he built a kitchen; and it is contended that the wife's money was used in building this addition; that she loaned him the money, and he expended it for that purpose. Several witnesses say that, in their judgment, this kitchen cost about five hundred dollars.

The only evidence to support the claim is given by Mr. Vaughan, who says: "When Long and me was working there, Long says, you will have a big house here; he said they needed a kitchen, and his wife had some money; and he thought he would build a kitchen; this is about all he said." It is not shown that the husband ever received a dollar from his wife, or that she ever paid for anything used in the construction of the improvement. The husband took receipts when he paid for labor and materials furnished. It does not appear that he was without means to pay for the improvements. It does not follow that because his wife had money he used it. This fact may have induced him to expend his own money in the erection of the addition to his own house; he may have found that there was not now the same necessity for the use of his own income in the family expenditures. Be this as it may, it is clear, that before a wife can be a creditor against her husband's estate for money loaned, she must show that her money passed over to him. The burden is upon her to establish this fact fully and clearly: *Hause vs. Gilger*, 52 Penna. St. R., 412.

Mrs. Brunner's money may have paid for the kitchen—it was so rumored in the neighborhood; but claims against decedents' estates can not be established by mere rumors.

As the claimant failed to show that her money reached the husband's hands, it is needless to consider the question whether there was a loan of money or an expenditure of the wife's money by the husband at her request in the improvement of their common home.

We are aware that an auditor's finding of fact is entitled to much weight; but where such finding is unsupported by the evidence, it should not prevail.

And now, March 3, 1890, the exceptions, save the last, are sustained.

ESTATE OF MARY A. M. MOORE, DECEASED.

A testatrix bequeathed a legacy to her "grand-daughter," without other words of description. By a codicil, she bequeathed "unto my grand-daughter, Laura R. Moore, my watch," etc. The testatrix left several grand-daughters. *Held*, That Laura R. Moore was the person entitled to the legacy mentioned in the will.

A latent ambiguity arises where a writing is perfect and intelligible upon its face, but from some circumstance admitted in proof a doubt arises as to the applicability of the language to a particular person or thing, and in such cases parol evidence is admissible to apply its provisions to the subject or person intended.

EXCEPTIONS to the report of John W. Bickel, Esq., auditor.

Larzelere & Gibson, Esqs., for exceptions.

George W. Rogers, Esq., contra.

The will of the testatrix contains the following clause, viz.: "I give and bequeath unto my grand-daughter one thousand dollars, to be paid in like manner out of the sale of my real estate"; and in a codicil to the will testatrix says: "I hereby give and bequeath unto my grand-daughter, Laura R. Moore, my watch," &c.

It was contended before the auditor by counsel for other legatees, that, as the testatrix had six other grand-daughters, the bequest in the foregoing clause is void for uncertainty and must pass into the residuary estate, while on behalf of Laura R. Moore it was claimed that she was the grand-daughter intended by the testatrix.

Testimony was taken to show the other persons answering the description "my grand-daughter," and then counter testimony was presented to show that Laura R. Moore alone of her grand-daughters lived with her, was the special object of her affection and regard, and that testatrix had told a number of persons that she had willed Laura one thousand dollars.

The auditor finds as follows: We regard the whole matter as simply a question of identity. Testatrix bequeathes one thousand dollars to "my grand-daughter," and in the codicil designates only one grand-daughter by name. The objectors show that she had other grand-daughters beside Laura R. Moore. It is then shown by the testimony of witnesses that this grand-daughter, Laura, occupied a peculiar relation to the testatrix, both domestic and in her affections, not occupied by the other grand-daughters, and that the testatrix told these witnesses that she had willed Laura one thousand dollars. Now the law is well settled that parol evidence can

Moore's Estate.

not be adduced to "contradict, vary, add to or subtract from" the contents of a will, and in the case now before your auditor nothing of the kind has been done. It is also well settled that "when there is a difficulty in applying the words of a will to the person or subject, and that difficulty does not arise on the face of the will itself, but is caused by extrinsic evidence, then resort may be had to other extrinsic evidence to remove the difficulty by showing what person or subject was really intended, as if it appears by evidence *dehors* the will that there are two or more persons or subjects that would come within the words of the will, parol evidence may be received to show which was intended." 2 Williams on Executors, page 1244, note x. 1; Domestic and Foreign Missionary Appeal, 30 Pa. St., 425. It is also well settled that "parol evidence may be produced to identify the beneficiary." Shield's Estate, 39 Leg. Int., page 159; Howell vs. Biddle, 2 Dallas, page 70; Cresson's Appeal, 30 Pa. St., page 437.

The meaning of a word capable of more than one construction may be determined by a consideration of the circumstances under which the will was made. Rose's Estate, 28 Pittsburgh, page 128.

The facts in this case clearly bring it under the law as above settled, and your auditor finds that the testatrix intended that her grand-daughter, Laura R. Moore, should be her beneficiary.

Your auditor has thus considered the question as raised by the parties, and he is confirmed in his conclusion by the consideration of the will and codicil as a whole and the application of the rules of construction of wills to the case now before us. We must endeavor, if possible, to ascertain the intent of the testatrix from the will itself; and in seeking for this intent we must examine her entire will, including the codicil, and from "the four corners" of the will gather her intentions.

"A will and its codicil are to be construed as one instrument for the purpose of discovering the intent of the testator." Kline's Appeal, 86 Pa. St., page 363.

The testatrix names "my grand-daughter" as her beneficiary in the "fifth" clause of her will; nowhere else in the will is any grand-daughter mentioned (she names her children as her beneficiaries), but when we examine the codicil we find a bequest to "my grand-daughter, Laura R. Moore."

Moore's Estate.

This then, under the rules for the construction of wills, would seem to determine whom the testatrix intended as her beneficiary in the "fifth" clause making the bequest of one thousand dollars to "my grand-daughter."

The person therefore in her mind, so far as we can gather from the will and codicil, was Laura R. Moore. She mentions no other grand-daughter; in fact nowhere from the will or codicil do we learn that she had any other grand-daughters. In the body of the will she says "my grand-daughter"; in the codicil she says "my grand-daughter, Laura R. Moore." It is evident that the testatrix intended her grand-daughter, Laura R. Moore, as the beneficiary both of the one thousand dollars bequeathed in the body of the will and also of the watch mentioned in the codicil. Your auditor therefore finds from the will itself that the testatrix so intended the bequest, and that Laura R. Moore is entitled to said legacy of one thousand dollars.

Opinion of the court by WEAND, J., March 3, 1890.

By her will, the testatrix gave all her property to her children, except a legacy of one thousand dollars, which she bequeathed to her "grand-daughter," without otherwise naming her.

By a codicil, testatrix bequeathed "unto my grand-daughter, Laura R. Moore, my watch," etc.

The decedent left a number of grand-daughters surviving her, and it is claimed that the legacy of one thousand dollars lapsed by reason of the imperfect description of the person to take. The auditor awarded the legacy to Laura R. Moore as the grand-daughter intended by the testatrix. We think he was clearly right in his conclusions.

A plain reading of the will and codicil shows that the testatrix intended to make no provision for any of her grand-children but one, and that one is mentioned in the codicil. Having in the will mentioned a grand-daughter as a beneficiary, the words of the codicil, "my grand-daughter, Laura R. Moore," clearly refer to the grand-daughter first mentioned. If the case is to be ruled by the will and codicil alone, we then have but one grand-daughter in existence, and that one Laura R. Moore. But if the language of the will is ambiguous, it is a latent ambiguity which is said to arise "where a writing is perfect and intelligible upon its face, but from

Moore's Estate.

some circumstance admitted in proof, a doubt arises as to the applicability of the language to a particular person or thing."

In *Patch vs. White*, 117 U. S., 210, it was said: "it is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such name or description." The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances or declarations of the testator: *Jarmin on Wills*, 370; *Hawkins on Wills*, 910.

In *Appeal et. al vs. Byers et. al*, 98 Penna. St. R., 479, a testator devised property to his nephew, Philip Byers. At the time of his death two persons were living known as Philip Byers. One was an illegitimate son of testator's brother, and the jury found that he was the nephew intended, whilst evidence was not admitted to show that testator intended his illegitimate nephew, yet the Supreme Court held that, if the language of the will applied to two legitimate nephews, so that either could take, but for the existence and claim of the other, then parol evidence would be admissible to prove which was intended.

The general rule, undoubtedly, is that parol evidence is admissible only to explain latent ambiguities in a will, or to apply its provisions to the subject or person intended, where the description is defective, uncertain, or too general to be understood: 3 W., 241; 8 H., 55; 12 H., 197; 6 C., 425-457; 5 P. F. S., 409.

It is admitted that the evidence offered, if competent, would sustain the auditor in his findings. Under any aspect of the case, therefore, the auditor was correct in his conclusions.

And now, March 3, 1890, the exceptions are dismissed and the report confirmed.

Court of Common Pleas of Montgomery County.
IN EQUITY.

THE CHESTNUT HILL AND SPRINGHOUSE TURNPIKE ROAD CO. VS. THE
PENNSYLVANIA RAILROAD CO.

A railroad company may not occupy the road-bed of a turnpike company by planting abutments in the highway, unless it is not reasonably practicable to build such railway without interfering with the highway.

The company may not justify such occupancy by showing that to span the entire roadway would materially increase the cost of an overhead bridge, or by showing that such occupancy will not materially interfere with the use of the highway.

Where a turnpike company fails to indicate at any time the extent of its appropriation save by the fence lines maintained on the sides of the roadway, a presumption arises that such fence lines constitute the outer limits of the turnpike road.

RULE to dissolve preliminary injunction.

Opinion of the court by SWARTZ, P. J., July 7, 1890.

The defendant company proposes to occupy part of the plaintiff's turnpike in the construction of an overhead bridge. We awarded a preliminary injunction to restrain the railroad company from thus interfering with the plaintiff's right of way for the reason that no cause was shown for such occupancy of the highway. In granting the injunction we stated that if there was any real difficulty in the way to span the entire roadway—that is, if it was not reasonably practicable to construct the railroad without encroaching upon the highway—the injunction could be dissolved upon the presentation of the facts showing such difficulty. A number of additional affidavits were filed, and the defendant now moves to dissolve the injunction, claiming that the affidavits and plans in evidence show clearly there is a necessity for the occupancy of part of plaintiff's road-bed.

The complainant's bill and the affidavits in support of the same set forth that the turnpike is operated to the width of sixty feet, and is opened of that width at the point of the proposed railroad crossing.

The defendant submits a draft made from actual measurements, and from this it appears that the true width of the road on the southern side of the proposed bridge, from the stone wall on the east side

of the turnpike to the opposite hedge on the west side, is but forty-six feet, and the width of the highway north of the bridge is less than fifty feet. These measurements are confirmed by our personal inspection of the grounds. The wall on the east side stands upon an old fence line which constituted the east boundary of the roadway for at least fifty years. The hedge on the west side was planted about twenty-five years ago, and follows an old fence line which it supplanted.

Several of the bridges over plaintiff's highway, not far from the railroad intersection in question, are but twenty-one to twenty-three feet wide from wall to wall, and the roadway north and south of the railroad crossing available for wagon travel is but thirty-two feet wide. The proposed railroad bridge crosses the turnpike diagonally, and the distance between the face of the abutments is seventy feet. The distance from that part of the east abutment farthest within the roadway, directly across to the west side of the highway, is forty-one feet.

The charter of the plaintiff company provides that the width of the road shall not be less than fifty nor more than sixty feet. The company claims that it took the sixty feet. The charter was granted in 1804, and a draft made in 1825 is submitted. The draft shows the line of the highway but does not locate the limits of the road-bed, although it purports to be the draft of a road sixty feet wide. There is nothing before us to show that the plaintiff ever indicated in any way the boundaries of its road. So far as we are informed no stones were set and no land-marks were fixed, as notice to the abutting land-owners of the extent of the plaintiff's claim of right of way. The draft was not recorded. The exterior lines of the road were apparently never defined save by the fence lines on the sides of the road, and these were not more than fifty feet apart at any place near the proposed railroad crossing. Can the turnpike company, under the facts as now disclosed, maintain their claim to a right of way sixty feet wide without first acquiring title beyond the existing boundaries by the methods pointed out by the law? This case is unlike *Stevenson's Appeal*, 17 W. N. C., 429. Stones were planted on the *Stevenson* line at the extreme boundaries of the turnpike, showing a width of roadway of sixty feet; these land-marks were fixed by the original survey. *Stevenson's* title ran from these stones to fixed corners on the rear of his lot. In *Commonwealth vs. Milten-*

Turnpike Co. vs. R. R. Co.

berger, 7 Watts, 453, the court said: "When corporate authorities took possession conformably to boundaries assumed by themselves, they acknowledge an adjoining ownership which could be divested only in the way known to the constitution." Where a railroad company has by its charter the right to take sixty feet but occupies a smaller strip, makes no marks upon the ground indicating the extent of the proposed taking and no draft of the land to be appropriated, but fences are built along the sides of the strip occupied and maintained for many years, the presumption arises that the right of way is limited to the strip so fenced: West Chester R. R. Co. vs. Goddard, 11 Cent. R., 829. See also Allen vs. Mayer, 1 Del. Co. R., 49. It would seem to us therefore that the turnpike company is confined *prima facie* to the right of way between the fence lines, that being the only method indicated by it to determine the extent of the appropriation. This indicates a roadway about fifty feet wide and a compliance with the charter designating a width of not less than fifty feet. At least the right to the additional ten feet is not so clearly established at this stage of the proceedings as to warrant an interference by preliminary injunction so far as the ten feet are involved. This we deem of great importance in the consideration of the question before us, for if the highway is but fifty feet wide and the roadway does not extend beyond the hedge line, then the west abutment as proposed is clearly located beyond the limits of the plaintiff's roadway. The east abutment as located is within the limits of the roadway, even if such highway is but fifty feet wide.

The defendant contends that such occupancy by the eastern abutment is no interference with the highway. Judged by the standard adopted by the plaintiff this may be true, for it is, difficult to see why a passageway forty-one feet wide is insufficient if a bridge but twenty-one or twenty-three feet wide is ample to pass the travel. But we must not forget that this obstruction is at the intersection of two highways, where there is necessarily much travel. As the company is about to establish a station at this intersection, it will thereby increase the public needs, and a stone structure extending into the highway even for five feet is an interference with public travel. But if we admit that such encroachment does not work any injury to the plaintiff, this is no justification to the defendant for appropriating part of plaintiff's roadway. Where no injury follows from such taking the railroad company should not be called upon to show

that same necessity for the occupancy as in cases where such occupancy works a substantial interference with the travel on the highway.

Does the defendant show that there is a substantial difficulty in spanning the entire highway or in spanning the fifty feet between the hedge line and the line of the stone wall on the opposite side? Two reasons are given: first, the additional expense; and secondly, a necessary change in the grade of the railroad as now established.

The additional expense in our judgment is not sufficient to warrant the encroachment. The plaintiff says a bridge to span the sixty feet will cost \$3,800 additional; the defendant makes the additional expense more than double this sum. To span the fifty feet the increase would be much less, as the bridge would not be lengthened more than seven and one-half feet;—that is, the length of the bridge would be increased to that extent to push back the east abutment about five feet.

The second ground for the encroachment is more meritorious. It is alleged that to span the sixty feet will necessitate an elevation of two feet in the grade of the railroad. The railroad approaches the highway from the west for five hundred feet on a series of ten stone arches built upon abutments in the Wissahickon creek and intervening meadow. This elevation of grade, it is contended, arises from the fact that a bridge of different construction must be used to span the sixty feet than that now contemplated under the proposed crossing. Such new bridge, it is alleged, will lessen the headway; and to retain the fourteen feet headway the grade of the railroad must be elevated two feet.

The location of the road rests with the corporation; it is not within our province to control such location: *Struthers vs. R. R. Co.*, 87 Penna. St. R., 282. Is it reasonably practicable to span the highway, taking the location of the railroad as we find it? If the spanning of the turnpike necessitates a railroad grade that interferes with the usefulness of the tracks, then the defendant company shows good cause for the encroachment. There is no such allegation, but it is claimed that "the road has progressed so far that it would be impracticable to elevate the grade." Was it impracticable when the location was fixed but before the work of construction was commenced? The company had notice before any work was done in the vicinity that any attempt to encroach upon the highway would

be resisted. The objection that it is now too late to clear the highway implies that there was a time when it was entirely feasible. There is nothing to indicate that it is not reasonably practicable to span, even at this stage of the construction, the roadway as now operated;—that is, of a width shown by the stone wall on the one side and the hedge fence on the other side. This will bring the east abutment in a line with the face of the stone wall, and will make the distance from the hedge line directly across to the nearest part of the east abutment forty-six feet instead of forty-one feet. The railroad company has devoted to public travel a triangular lot of ground on the west side of the turnpike nearly opposite the east abutment. The Skippack turnpike enters the plaintiff's road at this point of intersection, from the north, at an acute angle; and with the road-bed of the Skippack turnpike and the ground thrown out by the company, a clear roadway fully sixty feet wide is open to public travel, measured from any point in the base of the east abutment.

We conclude that the defendant company should so construct its abutments that no part of the same may fall within the hedge line on the west side and the line of the stone wall on the east side, if these lines are extended beyond the bridge crossing. According to the plans submitted this will require the east abutment to be set back five feet. The plaintiff company will then have the full use of its turnpike as now operated.

The preliminary injunction heretofore awarded is continued, subject to the foregoing modifications.

Supreme Court of Pennsylvania.

MOWDAY VS. MOORE.

An injunction to restrain the maintenance of a nuisance will not be granted where the plaintiff has not established his right at law, or it is not clearly made out by the pleadings or proofs. If the evidence upon this point is conflicting, the question should be submitted to a jury before the powers of a court of chancery are invoked.

That damage which is imminent and irreparable, or is not capable of adequate compensation in money, may be enjoined without waiting for the process of law, is not intended to be questioned, but the right must be clear and the facts upon which it rests uncontested. Failing this, all that the swift hand of the chancellor will do is to stay the impending mischief until the facts are established by the ancient and appropriate tribunal.

ERROR to the Court of Common Pleas of Montgomery county.

N. H. Larzelere and *M. M. Gibson, Esqs.*, for appellants.

Geo. W. Rogers and *D. Ogden Rogers, Esqs.*, for appellees.

The opinion of the Supreme Court was delivered March 31, 1890, by MITCHELL, J.

The rule in regard to the remedy by injunction in cases like the present is thus stated by Adams: "There is a jurisdiction in equity to enjoin, if the *fact of nuisance be admitted or established at law*, whenever the nature of the injury is such that it can not be adequately compensated by damages or will occasion a constantly recurring grievance" (Doctrine of Equity, 211); and in *Bispham on Equity*, where it is said that "the tendency of the modern decisions is certainly very much against the old rule, which required the prior establishment of the legal right" (page 491, 2d Ed.). The conclusion is, nevertheless, that "the modern doctrine may be stated in general terms to be that equity has concurrent jurisdiction with courts of law in all cases of private nuisance, the interference of chancery in any particular case being justified on the ground of restraining irreparable mischief, or of suppressing interminable litigation, or of preventing multiplicity of suits" (page 488, citing especially *Carlisle vs. Cooper*, 6 C. E. Green, 576); and after the discussion of illustrative cases, the result is summed up as follows: "If the complainant's title is doubtful, the ordinary rule is not to interfere until his title has been established at law" (page 490).

Mowday vs. Moore.

This subject was fully considered upon all the authorities in our own case of *Rhea vs. Forsyth*, 37 Penna. St. R., 503, and the true doctrine has nowhere been better expressed. "Where the plaintiff's right," says Woodward, J., "has not been established at law, or is not clear, but is questioned, * * * not only by the answer of the defendant, but by proofs in the cause, he is not entitled to remedy by injunction. It is not enough that he is able to produce some evidence of his right, when there is conflicting evidence that goes to the denial of all right. In a case so situated the plaintiff should first establish his right in an action at law, and then come into chancery, if necessary, for the protection of the legally established right." From these views this court has never departed; and how closely they have been adhered to, even where the nuisance complained of is alleged to be public and common, and injurious to the health and safety of a city, is shown by *McClain's Appeal*, 25 W. N. C., 246. "The authorities," says the Chief Justice, "uniformly limit the jurisdiction to cases where the right has been first established at law or is conceded. It was never intended, and I do not know a case in the books where a chancellor has usurped the functions of a jury and attempted to decide disputed questions of fact, and pass upon conflicting evidence, in such cases."

These principles are settled and ought to be familiar. But the modern and growing tendency, alluded to by Mr. Bispham in the passage above quoted, to bring such cases into equity in the first place, seems to require a restatement of the true limits of the jurisdiction. That damage which is imminent and irreparable, or is not capable of adequate compensation in money, may be enjoined without waiting for the process of law, is not intended to be questioned, but the right must be clear and the facts upon which it rests uncontested. Failing this, all that the swift hand of the chancellor will do is to stay the impending mischief until the facts are established by the ancient and appropriate tribunal.

Coming now to the examination of the case in hand in the light of the foregoing principles, it is at once manifest that this bill can not be sustained. The mischief complained of is not imminent; it is of considerable standing, and is no worse now than it has been for several years past. It affects only the pecuniary interests of complainant, and is capable of full compensation in money damages; and, above all, its origin from any cause for which defendant is lia-

Mowday vs. Moore.

ble is, at the least, extremely doubtful. A general review of the facts with reference to this last point is all that is necessary.

Complainant bought the lot from defendant. The weight of the evidence is overwhelming that it was at least partly made ground, and was wet and spongy at the time of the purchase and long before. Defendant, Corson, Gehringer, Oberholtzer and Rayner all so testify; and even the rebutting witnesses to the contrary nearly all admit that the silt from the cleaning out of the race and the refuse from the cooper shop, from time to time, were dumped on it. Complainant knew the character of the land, and that dry cellars could not be built on it. The testimony of defendant, Oberholtzer, Rose, Moore, Sr., and Rayner, to that effect, is practically uncontradicted. Complainant, with this knowledge, started to put cellars on his lot, the floors of which were below the level of the water in the race. His own witness, Hallman, the mason who laid the cellar walls, says the water came in on him so he had to build it in small sections. Yet in spite of this warning complainant did not lay his wall in cement, nor even puddle the earth, as he did in the second cellar, which was thereby kept dry. All the witnesses agree that he might have cemented his wall, or Moore's line wall and his own cellar wall both, so as to have kept out any water from Moore's lot, and at trifling expense. Even his own main witness, Calhoun, says it could have been done, but would have been expensive. He does not say how much; but equally competent witnesses, Corson and Oberholtzer, put the additional cost at ten dollars. Unless these witnesses are far astray in their judgment, the complainant's act in building as he did was one of inexcusable negligence.

Turning now to the defendant's acts, what do we find? He was the owner of a lot subject to the easement of this mill-race, with no control over it, and, so far as appears, no duty to repair. He knew the ground was wet, and showed his appreciation of the fact by constructing all his buildings from Main to Lafayette streets without cellars. When he built he put what is called a line wall on the boundary between his land and complainant's (but all within his own premises) and cross walls from the Mill street side to this line wall. There is no evidence in the case that this was an unusual way to build. On the contrary, even plaintiff's witnesses say, Houpt, that "cross walls were the proper thing to put in," and Mayberry, that they "were necessary to be put there for the construction of

Mowday vs. Moore.

Moore's buildings, and were well constructed." The only thing suggested is that defendant might have built differently, might have laid a wall in cement parallel to the race. But no witness, even now, says he was bound to do so, or that it was unusual, or improper, or negligent, to build as he did. In the absence of such testimony it is difficult to see wherein the defendant's fault lay, from which any liability would arise.

At law the plaintiff would have to make out a case of negligence on the part of defendant, and clear of it on his own part. The rule in equity is certainly no harder on a defendant. Even if this were an action at law, it is doubtful if plaintiff had made out his case. No better evidence of doubtfulness could be found than the failure of a jury to agree in an action for damages for this very same injury. This fact, which was put before the master, showed conclusively that the case was too doubtful for original relief in equity, and should at once have terminated the proceedings. But, as the case went to final hearing and decree, we have examined the whole evidence, and are of opinion that, in any aspect, whether of negligence of defendant or contributory negligence of complainant, the complainant has not only failed to make out a clear case in his favor but has left the weight of evidence on the side of defendant.

It is unnecessary to discuss the assignments of error in detail; but it is proper to say, as a matter of practice, that much of the evidence given in rebuttal was erroneously admitted. It was not properly answer to new matter introduced by the defence, but merely cumulative on the case in chief.

Decree reversed, and bill dismissed with costs.

COMMONWEALTH VS. HOLSTINE.

The plea of *non volo contendere*, although not technically a plea of guilty, is so in substance, and justifies the court in imposing sentence.

To sustain a conviction for selling intoxicating liquors under the act of 1887, it is not necessary for the commonwealth to prove a criminal intent.

A license to sell liquors authorizes the holder to sell them to any person in the commonwealth, provided he does so at his place of business. He has no right to peddle his goods through other counties not covered by his license and make sales there.

The employes of a licensed liquor dealer are protected only where the employer would be protected. If they sell in places where he is not entitled to sell, they are liable personally to indictment and conviction under the act of 1887.

A sale by a licensed dealer or his agent made in a place to which his authority does not extend, is not a violation of the second paragraph of Section 15 of the act of May 13, 1887, which relates to offences committed by persons having license, but of the first paragraph of the same section, providing a punishment for selling without a license.

APPEAL from the Court of Quarter Sessions of Montgomery county.

Louis M. Childs and *Montgomery Evans, Esqs.*, for appellant.

Henry M. Brownback, Irving P. Wanger and *J. A. Strassburger, Esqs.*, for appellee.

The opinion of the Supreme Court was delivered February 17, 1890, by PAXSON, C. J.

The defendant (appellant) was indicted in the court below for selling liquor without a license. To this indictment he pleaded *non volo contendere*. This, although not technically a plea of guilty, is so in substance, and justifies the court in imposing sentence: *Buck vs. Commonwealth*, 107 Penna. St. R., 486. We may therefore pass the somewhat elaborate argument to show that the defendant was not guilty with the single remark that it is not necessary, to sustain a conviction for selling intoxicating liquors under the act of 1887, for the commonwealth to prove a criminal intent. It is enough to show the sale, when the defendant may, if he can, shield himself behind a license. If the sale is contrary to law, the intent has nothing to do with it. A contrary ruling would fritter away the act of 1887, and convictions under it would be rare.

The defendant has no license. He was in the employ of one George W. Otto, a licensed bottler having his place of business in the city of Philadelphia. The defendant was the driver of Otto's wagon, and a portion of his route lay through Montgomery county. His duty was to deliver bottled ale and beer ordered by Otto's cus-

tomers to the persons who had ordered it. He was in the habit of taking orders in that county, which he returned to his employer in Philadelphia, who filled the orders; the beer and ale were loaded upon defendant's wagon, and he delivered the same in Montgomery county, and returned it to his employer. The transaction for which the defendant was indicted was of this character. This was clearly a sale and delivery in Montgomery county. The license held by Mr. Otto authorized him to sell in Philadelphia. He had a right to sell to any person in the commonwealth, provided the sales were made at his place of business: *Fleming vs. Commonwealth*, 25 W. N. C., 122. But he had no right to peddle his beer through other counties not covered by his license and make sales there. The defendant had no license, and is only protected where his employer would be protected. So far as sales in Montgomery county are concerned Otto had no license, and his license issued in Philadelphia would have been no answer to this indictment had it been found against him. The sentence was imposed under the first paragraph of the act of May 13, 1887, P. L. 113, which provides that "Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced to pay a fine of not less than \$500 nor more than \$5000, and undergo an imprisonment in the county jail of not less than three months nor more than twelve months." The court below imposed the minimum punishment fixed by the act. It was contended that the sentence should have been under the second paragraph of said section, which provides a lighter punishment where persons having a license are convicted of violating any of the provisions of the license laws. For the reasons already given we think the sentence was proper. It follows the indictment strictly, and, as before observed, neither the defendant nor his employer was licensed to sell in Montgomery county. It was urged that this was a hard case; that the defendant sold ignorantly, and did not know he was violating the law. This may be so, but we can not accept the plea of ignorance for violations of the act of 1887. The devices to evade it are so numerous and so adroit, and the consequences of its violation are so serious to the welfare and good order of the community generally, that we think it the duty of the courts to enforce the law rigidly. It is proper to add that all

Bank vs. Brodhead.

those who engage in this traffic in violation of law should know that the way of the transgressor is hard.

The judgment is affirmed, and it is ordered that Charles Holstine, the appellant, surrender himself forthwith to the keeper of the Montgomery county prison, there to undergo the sentence imposed upon him by the court below.

Court of Common Pleas of Northampton County.

FIRST NATIONAL BANK VS. BRODHEAD.

Defendant subpoenaed a number of witnesses to testify to his character for truth and veracity in the event that it would be attacked by the plaintiff. In the absence of any reasonable ground for this belief, and no such attack being made, *held*, that the fees of the witnesses so called would not be allowed.

SUR APPEAL from taxation of costs.

W. E. Doster, Esq., for plaintiff.

R. L. Cope, Esq., for defendant.

Opinion of the court by REEDER, J., February 17, 1890.

A large number of witnesses, namely twenty, were subpoenaed by the defendant to be present at the trial of this cause. The only witness called and sworn in behalf of the defendant was the defendant himself. The defendant filed his bill of costs, including witness fees and mileage for each one of those twenty witnesses. Upon the taxation of the bill by the Prothonotary the fee and mileage were allowed for all of them except two. To this disposition by the Prothonotary the plaintiff excepts. It appears from the depositions and by the admission of the attorneys engaged in the trial that these witnesses were called to testify to Mr. Brodhead's character for truth in the event that it was attacked by the plaintiff. It is undoubtedly true that a witness who is subpoenaed, though not examined, may be entitled to witness fees if he is subpoenaed to testify to some matter competent and relevant to the issue. See *Brightly's Law of Costs*, Sections 286, 287. For a party, if satisfied with his case, is

Wilbur Street.

not bound to call all the witnesses who may have been subpoenaed by him. But that is not this case. In the case under consideration the defendant, desiring to fortify himself on all sides, and to be prepared for any attack, subpoenaed these witnesses in order to be prepared to meet any attack upon his character for truth, should one be made by the plaintiff. There was no reasonable ground for his believing such an attack would be made, and he was controlled by the possibility such as might arise in any and every case. This he did upon his own responsibility and at his own individual risk. As no attack was made, and at no point of the case could this testimony have been received, the exceptions of the plaintiff must be sustained and the entire bill of costs be disallowed.

Now, February 17, 1890, the exceptions of plaintiff to defendant's bill of costs are sustained and defendant's bill of costs disallowed.

Court of Quarter Sessions of Carbon County.

IN RE WILBUR STREET.

In proceedings to open a public street in a borough under act of 22 April, 1856, the persons whose properties are to be affected by the opening are entitled to notice of the time and place of meeting of the viewers.

The total assessments for contributions upon properties benefited by the opening of streets in a borough can not exceed the total amount of damages allowed.

In the matter of the assessment of damages and for contributions on the opening of Wilbur and First streets in the borough of Weatherly. Sur exceptions to report of viewers as respects the assessments made for contribution.

Freyman & Heydt, Esqs., for exceptions.

Craig & Loose, Esqs., contra.

The opinion of the court was delivered by DREHER, P. J.

The proceeding is under the act of 22d of April, 1856, Purd. 212-13. Supplement to the general borough law, the first section

Wilbur Street.

of which provides that when the borough authorities shall open or be about to open any street or alley, or to widen or extend the same, they may apply to the court, setting forth the facts, for the appointment of seven disinterested freeholders of the borough, who, being first duly sworn or affirmed, shall proceed to view the premises, having regard both to the advantages and disadvantages caused to the several properties along the line of and adjoining said streets and alleys, and shall assess and allow to all persons injured thereby such damages as they shall have sustained respectively, over and above all advantages; and shall also make assessments for contribution upon all such properties as shall be benefited by the opening, widening or extension of said streets and alleys, such sums respectively, as they may have been benefited over and above all disadvantages.

The second section provides that the viewers shall make report to the next session of the court, describing the properties upon which assessments shall have been made, specifically stating whether for contribution or for damages, with the amounts respectively, and the court may, at the next sessions thereof, or at any subsequent session, on the hearing of such parties as choose to contest the same, modify, approve and confirm the said report, which confirmation shall be final and conclusive upon all parties; and the burgess and council may proceed to collect all such damages and assessments for contribution in the same manner as other debts due such boroughs are by law collectable.

At the argument on the exceptions I was disposed to think, and suggested that the only remedy of parties dissatisfied with the assessments on their properties for contribution was by petition for review, and the counsel seemed to accept the suggestion as correct, but in this I was mistaken. I had in my mind the case of a public road, where the same viewers lay out the road and assess the damages occasioned thereby to land owners.

The act of assembly under which the present proceeding is had, does not provide for a review, and I have grave doubt whether the court can grant a review. See Warriorsmark Road, 126 Penna. St. R., 305.

The exceptions are by those persons upon whose properties assessments were made for contribution.

Wilbur Street.

1. The first exception is that exceptants had no notice of the time and place of meeting of the viewers. It does not appear on the face of the report nor in the evidence that the exceptants were notified. Indeed, it was admitted at the argument that no notice was given. It is argued, however, that the act of 1856 does not require such notice.

It is a general principle that no man's property shall be taken or charged for public use without notice affording him an opportunity to be heard. In *Road in South Abington*, 109 Penna St. R., 118, Mr. Justice Clark says: "In act of 1856 . . . there is no provision made for notice . . . But as the appropriation of a man's property and the assessment of his damages without notice is repugnant to every principle of justice, it was held in a number of cases under the act of 1836, notably in *Needly's Road*, 1 Barr, 355; *Boyer's App.*, 1 Wr., 257; and *Central Railroad Co.'s App.*, 6 Out., 38, that notice to the property owner is absolutely essential to the validity of the view or assessment."

This first exception must be sustained.

2. The second exception is that the draft accompanying the report does not give the courses and distances, and is indefinite and uncertain. We think the draft as complete as the law requires.

3, 4, 5. These exceptions are to the effect that the viewers in their assessments for contributions did not take into consideration the disadvantages to the properties of the exceptants, and did not take into consideration the value of their land taken.

The report sets forth that the viewers, having first been duly sworn, proceeded to view the premises, "and having had regard to both the advantages and disadvantages, caused to the several properties along the line, and adjoining said Wilbur and First streets, and after due consideration, we do assess and allow to John Larrish the sum of \$642.71 as damages which he has sustained over and above all disadvantages, by reason of the opening of said streets. And, also, after due consideration we do assess for contribution upon the following properties which are along and adjoining said Wilbur street, and benefited by the opening of the same, as follows, viz.:" [Here the owners are named and properties described and assessments for contribution severally stated]. "And, also, after due consideration, we do assess for contribution upon the following

Schoner's License.

properties which are along and adjoining said First street, and benefited by the opening of the same, as follows." [Here the owners are named and properties described and assessments for contribution severally stated].

The viewers do not say in each case that they considered the advantages and disadvantages to the respective properties assessed for contribution; but in the fore part of the report they say: "having had regard to both the advantages and disadvantages to the several properties along the line and adjoining said Wilbur and First streets"; and then the damages allowed and assessments for contribution are given.

We think it sufficiently appears that the viewers took into consideration the advantages accruing to the several properties.

The assessments for contribution amount to \$1,142.13, and the damages allowed are \$642.71. This, we think, is wrong. The assessments for contribution may be less than the damages allowed, in which case the borough must pay the difference out of the common treasury, but it is not the intention of the law that assessments might be made for contribution in excess of the damages allowed for the benefit of the public treasury.

And now, to wit, June 18, A. D. 1890, the report of the viewers is set aside at the cost of the borough of Weatherly, with leave to the burgess and council to commence proceedings de novo; or, upon motion, to have new viewers appointed upon the old petition.

Court of Quarter Sessions of Bucks County.

IN RE WILLIAM SCHONER'S LICENSE.

The signatures of the recommenders, upon an application for license to sell liquor, may be lawfully written with a lead pencil.

SUR APPLICATION for liquor license.

N. C. & F. D. James, Esqs., for the applicant.

The opinion of the court was delivered by YERKES, P. J.

The certificate attached to this petition is signed by but twelve recommenders, one of whom, A. F. Scheetz, has written his name

Schoner's License.

with a lead pencil. The sixth section of the act provides that the certificates shall be signed by at least twelve reputable qualified electors of the ward, borough or township in which the liquors are to be sold.

In *Smith's Application*, 3 C. Co. Rep., 314, Judge Futhey, of Chester county, held that a signature to a license recommendation in pencil was not sufficient. If that decision be correct, this license must be refused.

The subject of the sufficiency of a lead pencil signature was thoroughly reviewed in *Meyers vs. Vanderbilt*, 84 Pa. St. R., 510, where the question was over a will signed in lead pencil. It is there laid down as a rule, supported by numerous authorities, that whenever a statute or usage requires a writing, it must be made on parchment or paper, but it is not essentially necessary that it be in ink. It may be in pencil. The same rule applies to promissory notes, book accounts and contracts, and it was there decided, in relation to the signature of the testator, that the manifest object of the Act being to permit a will to be signed as any other written instrument may be signed, a valid will may be drawn with the same materials that will suffice for the drawing of any written contract. We think that the signing of a recommendation in a license application is not a more solemn act than the making of a promissory note, a contract or a will. The sooner that it is generally understood that the same principles apply to license applications as in other cases the better it will be.

For these reasons we are constrained to disagree with the decision made in *Smith's Application*, and to hold that a lead pencil signature by a recommender is good; although we think that owing to the liability to erasures, the practice of making important signatures in pencil ought to be discouraged.

The license will be granted.

Court of Common Pleas of Northampton County.

PYSHER VS. PYSHER.

A judgment was entered by a justice of the peace March 16, 1876. Execution was entered thereon January 29, 1889, without a scire facias having issued in the meantime to revive the judgment. The transcript of the justice was brought into the Common Pleas on January 30, 1889, and an attachment in execution was issued upon it. Upon this judgment no execution was issued before the justice and no return of "no goods" made until thirteen years after judgment was entered. Upon a rule to strike off the judgment and quash the writ of attachment in execution, *held*, that the judgment might stand but that the writ of attachment would be set aside on motion of the defendant.

SUR RULE to show cause why judgment should not be stricken off and writ of attachment in execution quashed.

The petition in support of the rule to strike off the judgment and quash the writ of attachment sets forth that the judgment was entered on a transcript from the docket of Jacob Schimmel, a justice of the peace, which judgment was entered by the justice in his docket on March 16, 1876; that an execution was issued under said judgment by the justice on January 29, 1889, and returned "defendant not found in the county of Northampton and no goods and no money made"; that there had been no scire facias issued to revive the judgment; that execution had been issued more than twelve years after the rendition of the judgment; and that the return to the execution by the constable was irregular, the defendant at the time having been a non-resident of the county.

W. S. & M. Kirkpatrick, Esqs., for rule.

The execution issued by the justice on January 29, 1889, was null and void: Act of May 15, 1854, Sec. 1, *Purd. Dig.* 997, pl. 115; *Bauman vs. Rathbone*, 3 Grant, 259.

An attachment execution is in substance if not in form an execution: *Minnig vs. King*, 8 W. N. C., 342. It differs from a *feri facias* only in that reaches effects from which the debt could not

Pysher vs. Pysher.

otherwise be levied: Wray vs. Tammany, 13 Penna. St. R., 394; Moore vs. Ridsen, 3 Clark, 408.

No attachment execution can be issued by a justice without previous return of, "no goods": Act of April 15, 1845, Sec. 2, *Purd. Dig.* 999, pl. 126. See *Moore vs. Ridsen*, *supra*; *Dunn vs. Fries*, 3 Clark, 113; *Guerin vs. Guest*, *Id.*, 111; and also the opinion of Judge Pearson in *Snyder vs. Enterline*, 1 Pearson, 81.

John C. Merrill, Esq., contra.

As it gives the defendant his day in court an attachment execution may issue after the lapse of five years without a *scire facias* to revive: *Ogilsby vs. Lee*, 7 W. & S., 444; *Gemmil vs. Butler*, 4 Barr, 232; *Troubat & Haly's Practice*, page 683, pl. 1179, 1180.

An attachment execution lies on a transcript of a justice filed in Common Pleas: *Hitchcock vs. Long*, 2 W. & S., 169; *Reichenbach vs. Arnold*, 2 Clark, 527; *Brechemin vs. McDowell*, 1 Phila., 368; *Herd vs. Brown*, 4 *Leg. Gaz.*, 83.

The act of May 15, 1854, P. L. 581, Sec. 1, has no application. This is not an execution, but an attachment in execution, in which the defendant has his day in court. See *Swanger vs. Snyder*, 50 Penna. St. R., 218.

Opinion of the court by REEDER, J., February 17, 1890.

This is a motion for a rule to strike off the above judgment and the attachment execution issued thereon. The judgment was entered in a transcript from the docket of Jacob Schimmel, Esq., a justice of the peace. The judgment was entered by the justice March 16, 1876. No execution was issued thereon until January 29, 1889, nearly thirteen years afterward, no *scire facias* having issued in the meantime to revive said judgment. After the transcript was brought into the Common Pleas, viz., January 30, 1889, an attachment execution was issued upon it. The motion now before the court is to strike off the judgment and the writ of attachment in execution.

We can not strike off the judgment. There is nothing before us which will justify such action. For any purpose which it may properly serve it stands a judgment in the Courts of Common Pleas. The motion, however, to strike off the writ of attachment execution rests upon much stronger ground. The act of May 18, 1854, Sec. 1, *Purd. Dig.*, page 997, pl. 115, provides no "execution shall issue

Pysher vs. Pysher.

on judgment rendered before a justice of the peace or alderman after five years from the rendition of such judgment, unless the same shall have been revived by scire facias or amicable confession."

The execution issued by the justice falls within the inhibition of this act, and was therefore void. Can an attachment in execution issue upon a judgment more than five years old without revival? There is no doubt it can where the judgment was originally obtained in the Court of Common Pleas: *Ogilsby vs. Lee*, 7 W. & S., 444; *Gemmill vs. Butler*, 4 Penna. St. R., 232. It is provided, however, by the act of April 15, 1845, Sec. 2, *Purd. Dig.*, page 999, pl. 126, that an execution must be issued and returned "no goods" before the justice can issue a writ of attachment execution. Can this provision be evaded by removing the judgment into the Court of Common Pleas? We think not. It is held in *Swanger vs. Snyder*, 50 Penna. St. R., 218, that an attachment execution so issued is irregular but not void, and that if the defendant acquires in the process the money may be made in the writ in face of the protest of the garnishee. But it is not held that such irregularity would not vitiate the writ on the motion of the defendant, as in this case. The writ will be set aside on the motion of the defendant where there has been no return of "no goods" on an execution issued by the justice: *Hughes vs. Stetts*, 2 Luz. L. Reg., 240; *Moore vs. Ridsen*, 3 Clark, 408; *Clevenstine vs. Law*, Id., 417.

Now, February 17, 1890, rule to strike off writ of attachment in execution made absolute.

COMMONWEALTH VS. PARKS.

Base-ball playing on Sunday, at an unfrequented place, is not such a breach of the peace as to make the parties playing indictable for a common nuisance, in the absence of evidence that any one in the immediate neighborhood was disturbed by any disorder or misbehavior on the part of the people present.

To constitute a breach of the peace, the peace must be broken or disturbed by such disorderly and unlawful conduct as actually disturbs the peace and quiet of somebody in the immediate neighborhood where the acts complained of are committed.

HABEAS CORPUS.

Complaints for a common nuisance and a breach of the peace, caused by base-ball playing on Sunday, June 8, 1890, on Chain Dam island, in Northampton county, were made before an alderman in the city of Easton, in said county, against the players and officers of the Easton Base Ball Club. Warrants were issued by the alderman, and the parties appeared and, with the exception of William R. Parks, entered into recognizances for a hearing. In default of bail Parks was committed; whereupon a writ of habeas corpus was sued out for his release. At the return of the writ it appeared that Chain Dam island was situated about three miles from the city of Easton, in the Lehigh river, and there was no evidence that any one in the immediate neighborhood was disturbed by any disorder or misbehavior on the part of the persons in attendance or playing.

William Beideman, Esq., for relator.

H. W. Scott and A. Goldsmith, Esqs., for respondent.

Opinion of the court by REEDER, J., June 14, 1890.

I regret exceedingly that in the disposition of the case before us I am forced into the unfortunate position of being obliged to decide it contrary to my own convictions of what is proper in the opinion of the world and that which is morally right in the sight of God, and also to decide it contrary to the opinion of my colleague on the bench.

We are sitting here to construe the law as we find it, in order to determine whether this is a proceeding in accordance with the laws of Pennsylvania. Whether the act charged here constitutes a wrong to be redressed, or whether the act should be prohibited, is not the question now before the court. The question before us is whether the proceeding that has been instituted is the proper one to

secure the end contemplated. I yield to no one in readiness to condemn the conduct of this defendant and his associates in their desecration of the Sabbath. That they did that which was morally wrong there can be no doubt; and, while the court believes that such an outrage upon the moral sentiment of our religious community should be and ought to be prevented and prohibited, yet we can not, in the performance of our conscientious duty, prohibit it by sustaining this proceeding unless it has been instituted in accordance with existing law. I am embarrassed by my brother Judge Schuyler's disagreement with me as to the construction of the law. He is of the opinion that this proceeding is authorized by the law of Pennsylvania, while I am not of that opinion. We do agree, however, that this conduct on the part of the defendant and those associated with him, outraging, as it does, all the best feelings of the moral and religious people of our community, is such that some remedy ought to exist somewhere for it; and that, when the remedy is found, it should be enforced without hesitation upon the part of the court. The point upon which we disagree is as to whether this is the proper remedy. I think it is not; and it is with regret and embarrassment that I find that my brother Schuyler does not agree with me, but believes that it is. The case, however, is my case, having originally been brought before me, and I am obliged to take the responsibility and decide it according to my honest convictions as to what the law is which is applicable to the case. In the conscientious performance of my official duty I have no right to determine that because this is a great outrage upon the moral sentiment of the community, therefore the defendant should be held in this proceeding. I have no right, simply because I believe that this is an act that should be prohibited, to decide that therefore this proceeding should be permitted to go on in order to prevent it. If I honestly and conscientiously believe, as I do believe, that this proceeding is unauthorized by the laws of our state—and that is my honest and sincere conviction, although it is in opposition to my inclination and sentiment in the matter—yet I must still do that which I believe to be in accordance with my official duty and the sanctity of my official oath. I have no sympathy with these people who are desecrating the Sabbath in this way, and who are now threatening, it appears, to repeat the act; but as no evidence has been submitted of any breach of the peace, this defendant can not be held upon this commitment.

Sabbath breaking is not in itself a breach of the peace. A man may do that which is wrong according to the judgment and opinion of every Christian man and woman in the community, and yet not be guilty of a breach of the peace. This defendant may have done that which shocks the moral sentiment of all the good people of our city, and yet not have been guilty of the precise offence charged against him in this complaint and upon which he is now before us on this hearing. I believe that he has done wrong; I believe that he should be stopped from doing that which he and those with him threaten to do again; and I believe that it is contrary to the wishes and the moral sense of the entire community. And, as I said before, when the proper remedy is found which will prevent such exhibitions, the persons who will seek its application here will find this court heartily in accord with them in its enforcement.

I do not believe, however, that this proceeding is the remedy authorized by law. I do not believe that any one who threatens merely to do that which may shock the moral sense of a community is subject to arrest and binding over to appear at our next Court of Quarter Sessions, and to be held under bonds here as well as there to keep the peace. To hold so would be opening the flood-gates upon our Court of Quarter Sessions, and would pour upon it such a torrent of complaints of this character as would overwhelm it with its volume. But even that fact would not make us hesitate in the performance of that which we believed to be our duty.

In the act of 1794 we do find a remedy for offences such as this. Whether that remedy stands alone as the only remedy, and whether it is sufficient to prevent the commission and repetition of offences such as the one under consideration now, is a matter with which this court has nothing to do at present. If the fine imposed by that act is not sufficient, then the Legislature can, if it sees fit, pass an act which will be severe enough in its penalty to prevent such an outrageous violation of the religious and moral sentiment of the state in the future. This offence is not the first of its kind in the state of Pennsylvania, yet it is the first time in all the complaints that have been made in cases of a similar character in which this remedy has ever been attempted to be invoked. The people of this whole state have had their attention called to acts of this character; and it is the duty of the Legislature, if the terms of the act of 1794 are not

broad enough and its penalty not severe enough to punish and repress offences of this character, to pass an act which is sufficiently stringent in its provisions to attain the end.

I believe, however, that, outside of the act of 1794, there is a remedy in our courts which can be found and employed to prevent a repetition of acts of this kind; and when that remedy is found, and persons desecrating the Sabbath by exhibitions of this character are brought before us, none will be found more willing, more eager or more earnest than this court in its enforcement. But as that question is not now before us, I do not propose to pass upon or say more about it at this time.

The law is not elastic. It is not like paint, for instance, which you can put on or leave off at pleasure. A judge can not apply the law as a man uses paint—to suit his own taste and ideas of fitness and propriety. It is the duty of the court to consider and apply the law as he finds it. A legal principle is fixed, unbending and unvarying in its application. Once determined upon, it applies to all cases of like character. It does not lie in the conscience or discretion of a judge to say that this legal principle he will apply here, but will not apply it there, when the cases are of the same kind. Its application is universal and inflexible. Where it is once established as a principle of law, it must always be applied in cases of like character. If we hold this defendant upon this proceeding, where then are we to draw the line? If the case before us is a breach of the peace, then it would also be a breach of the peace if a dozen men should gather together and go to the same island or to any other similar place in our immediate vicinity and spend Sunday at some innocent game, diversion, or recreation. Such an act, of course, would be morally wrong and would be shocking to the moral sense of the community. But would it be a breach of the peace? Wherein has the peace been broken by this defendant? The commonwealth's attorneys answer, In doing that which has shocked and awakened the opposition of the entire moral and religious sentiment of the people of this city. But the offence was not committed in this city. There was no disturbance of the peace here. To constitute a breach of the peace, in law, the peace must be broken or disturbed by such disorderly and unlawful conduct as actually disturbs the peace and quiet of somebody in the neighborhood where the acts complained of are committed. A dozen men going to a place that is isolated,

and where there are no residents, to do that which is shocking to the moral sense of everybody, do not commit a breach of the peace. The acts complained of must be such as disturbed the peace and good order of the people in the neighborhood where they are committed.

This defendant upon a certain day went to an isolated island in the Lehigh river, where there were no inhabitants, and there engaged in a game of ball. There is no evidence that any one living in that vicinity was disturbed by any disorder or violent conduct or behavior on the part of the people who were present that day at the game of ball. But it is claimed that what they did that day was repulsive to the moral sentiment of the people of the city of Easton and its vicinity. A breach of the peace can not be committed by a violation done a sentiment, no matter how strong that sentiment may be, though it may be a matter of conscience or a religious belief. It is not enough to say that the moral sentiment of the people at a distance was outraged by this defendant and his associates. There must be some proof of the actual physical disturbance of the peace and quiet of the people in the neighborhood where the acts were committed in order to constitute a breach of the peace. That can only constitute a breach of the peace—except where there are threats to do injury to the person or property of another—where the disturbance is to those who actually hear or see the act complained of. No matter how offensive the act may be to a community or how much censure or condemnation it may arouse or awaken, if it is learned of only through published or printed description or from the relation of participants, it is no breach of the peace. Were the law otherwise, it would be possible for persons in Allentown, wrongfully doing that which (being heard of or read about in Easton) created excited opposition, censure and condemnation, to be guilty of a breach of the peace here, a proposition so absurd that none could be found bold enough to contend for it. Unless the defendant and his associates disturbed the peace of the neighborhood where the acts complained of were committed, and of this there is not a syllable of proof before us, this defendant can not be held in this proceeding.

Let us look for a moment to where the contrary view would lead us. I am told (whether it is the fact or not can make no difference for the purposes of this case, and we may therefore assume

it to be true) that during last summer scarcely a Sunday passed when people did not gather together upon this same island for the purposes of diversion and recreation. In some instances three or four families would gather together and go to this island for the purposes of recreation and diversion on the Sabbath. That, of course, is just as much a violation of the act of 1794 as that now under consideration, and is punishable under the act of 1794 by the same penalties as this, and is as much a breach of the peace as this. And if we hold these defendants in this proceeding, then the same principle of law would have to be applied in the other case, and we would be obliged to bind over those men, women and children; and if they were unable to give bail, to imprison them until the following term of the Court of Quarter Sessions for a breach of the peace on their part. Yet their conduct may have been nothing more than that which would have been regarded as perfectly innocent on any other day of the week than Sunday. Of course their acts would have been a violation of the command of God, and would have been a desecration of the Sabbath day. But it would not have been a breach of the peace such as would have justified the court in binding them over. The application of the legal principle must be the same in both cases. If we could not hold them, we can not hold this defendant; and if we held this defendant, we would then have to hold the parties offending in the way I have indicated. There would be no end to the cases that could be brought and would be brought for breaches of the peace if every orderly and quiet desecration of the Sabbath day is to be treated by our courts as a breach of the peace in itself, without further proof that somebody's peace and quiet has been actually disturbed. If this defendant, together with his associates, had engaged in a game of ball in the public streets in the city of Easton, or, for that matter, in any populated district in this county, on a Sunday, of course it would have been a breach of the peace. But when they engaged in a game of ball in an isolated spot, where there is nobody to be disturbed, and hence where there can be no disturbance, they surely can not have committed a breach of the peace.

It is a desecration of the Sabbath, and it is an offence that we must morally condemn; yet it is not a breach of the peace. And believing this, I would be violating the sanctity of my oath to hold this defendant under this proceeding when I do not believe it to be

Cook vs. Neal.

justified by the law. Where is the proof that anybody has been disturbed in the enjoyment of his peace and quiet by the playing of this game upon this day? Where is the witness who says that he lives in that neighborhood, or that passed there, and was disturbed? It is not any answer to this to say that there were many other people there upon that day, and allege that they must have been disturbed. They went there for the very purpose of witnessing this game of ball, and if their peace and quiet was disturbed, then every game of ball, even on a week day, is a disturbance of the peace when spectators are present. There is not one syllable of proof to show that the peace and quiet of anybody was disturbed by the conduct of this defendant and his associates.

No matter, therefore, how guilty they may have been of desecrating the Sabbath day, and thus violating the moral and statute law of the land; no matter how severely we may feel inclined to censure their conduct, under the evidence the defendant is not guilty of the offence complained of here, and therefore can not be held on this commitment.

For the reasons which I have given, this defendant must therefore be discharged.

Court of Common Pleas of Montgomery County.

NEVILLE COOK VS. WILLIAM H. NEAL.

Where a sub-contractor files a lien without stating the amount and kind of materials furnished, he may amend by filing a bill of particulars setting forth these facts.

A defective description of the building may be amended if the description and location given are sufficient to support such amendment.

A new party, as owner, can not be added by amendment after the statutory time for filing the lien has expired.

MOTION by owner to strike off lien, and motion by claimant for leave to amend.

March & Brownback, Esqs., for plaintiff.

Childs & Evans, Esqs., for defendant, Clara N. Hoffman.

Opinion of the court by SWARTZ, P. J., June 2, 1890.

This claim is clearly defective, and unless amendable the motion to strike off must prevail.

The lien fails to state the nature or kind of work done, or the kind and amount of materials furnished, or the time when furnished, or the time when the work was done. We have nothing but a lumping charge. This is not sufficient. But the lien is amendable as to this defect. The claimant may file an amended bill of particulars fully setting forth these facts, and he may do so even after the statutory time for filing the lien has expired: *Snyder Chapel vs. Baer*, 3 Penna. St. R., 530.

The description of the buildings is defective, but the claimant may amend as to this defect; the description and location are sufficient to support an amendment: *Dolan vs. Market Co.*, 19 W. N. C., 87.

We think there is sufficient in the lien to show *prima facie* that the claim is filed against the building as a new structure. The lien states "and the said Neville Cook claims to have a lien on said buildings and the lot or piece of ground and curtilage appurtenant to the said building from the commencement thereof."

The third assignment for striking off the lien sets forth that "the said lien does not join the said Clara N. Hoffman as owner, as required by law." If this were true the lien would fall, for a new party, as owner, can not be added by amendment after the statutory time for filing the lien has expired: *Knox vs. Hilty*, 118 Penna. St. R., 430. But the lien does set forth that Clara N. Hoffman is the owner of the buildings, and that William H. Neal is the contractor. In the caption of the lien the name of the owner is omitted; but this is not material where the body of the claim sets forth the fact of her ownership. She was not prejudiced by this omission, for the Prothonotary was in duty bound to index the lien against her, and has done so.

And now, June 2, 1890, the rule to show cause why the lien should not be stricken off is discharged, and the rule for leave to amend is made absolute.

BODEY & LIVINGSTON VS. ALEXANDER M. THACKARA AND ELEANOR
S. THACKARA, HIS WIFE, OWNER, &C., AND L. W. KITZELMAN,
CONTRACTOR.

Where materials are furnished and used in the improvement of a married woman's property by her direction, or with her knowledge and assent, and are reasonably necessary, the law gives a lien on her property.

A provision in the contract for the erection of the building that the owner shall pay the contractor upon certificates of the architect, upon sufficient proof that all claims on the building for work or materials up to the time of payment are discharged, does not take away the right of a sub-contractor to file a mechanics' lien.

The owner can not be compelled to pay more than the contract price for the building, if he takes proper steps to protect himself in the payments that he may make.

MOTION and reasons for a new trial.

Wanger & Knipe, Esqs., for plaintiffs.

Wm. H. Peace and F. G. Hobson, Esqs., for defendants.

Opinion of the court by SWARTZ, P. J., September 1, 1890.

Kitzelman, the contractor, entered into a written agreement with Alexander M. Thackara, the husband of Eleanor S. Thackara, for the erection of a dwelling-house. Mrs. Thackara was the owner of the land upon which the house was erected. Her counsel now contend that there was no proof sufficient to go to the jury showing any liability on her part to the plaintiffs for the materials furnished in the construction of the building. The evidence discloses that Mr. Boyden was the architect. When Kitzelman called at the architect's office, prior to the execution of the contract, Mrs. Thackara was at the office examining the plans for the house. She called at the house frequently during its construction and "gave directions to the contractor about anything she wanted done about the work." Another witness says, "Mrs. Thackara visited that building during its progress of erection for a while every day, and sometimes twice a day. When she was there she looked around and wanted things cleaned up. * * * She paid attention to the progress and character of the work while it was going on. She gave orders as to the performance of some work." She wrote letters to the claimant urging him to send on material without further delay. This evidence, with the other facts and circumstances in the case,

Bodey & Livingston vs. Thackara et al.

was sufficient to sustain a finding that the materials were furnished to her property by her direction or with her knowledge and assent, and this is all that the law requires where there is proof that the materials were proper for the improvement of her estate, necessary for such improvement, and actually used in the construction: *Einstine vs. Jamison*, 95 Penna. St. R., 407; *Forrester vs. Preston*, 2 Pitts., 298.

It is also contended that the claimant, being a sub-contractor, had no right to file a lien by reason of the provision in the written agreement with the contractor. The contract provides, "that Thackara should pay Kitzelman upon certificates of the architect upon sufficient proof that all claims upon the building for work or materials up to the time of payment are discharged." This stipulation is unlike the provision in *Schroeder vs. Galland*, 26 W. N. C., 33. In the latter case the contractor agreed to build, finish and deliver the building to the owner "free of all liens and encumbrances, or any claims whatever that might arise under any action of the party of the second part or his legal representatives under this contract." This was held to be an agreement on the part of the contractor not to file any lien and binding upon any sub-contractor.

In the case at bar the contractor might pay for work done and materials furnished and then file his lien to secure for himself the privileges of such statutory lien. Suppose he is unable to pay the material men when the building is completed, may he not file his lien, protect his claim, and recover upon it as soon as the material men are paid and the certificate of the architect is obtained?

There is no stipulation against liens, but a provision that Kitzelman is to have no money until certain conditions are complied with. He may file his lien, but a *sci. fa.* is premature until the claim for work and materials are discharged. In *Campbell vs. Scaife*, 1 Phila., 187 (District Court of Allegheny), Lowrie, J., says: "The second plea does not deny the facts upon which the lien depends, but avers matters tending to show that the plaintiff ought not to have execution thereof. It avers that the time of payment has not yet arrived, from which the proper inference is that the *sci. fa.* is prematurely issued, and the prayer should be that the writ be quashed." An agreement not to receive pay until

Bodey & Livingston vs. Thackara et al.

certain conditions are complied with is not a waiver of the right to file a lien.

As we read the provision in the contract, it was not to exclude liens, but to protect the owner against the misapplication of money paid to the contractor. The owner's money was to be applied to the payment of bills contracted in the construction of the house. The provision in the contract was in the interest of the material man, as well as for the benefit of the owner. The sub-contractor was bound to know the provisions of the contract, and an examination of the same would reveal to him that he could safely supply the material, for he was sure of his money, provided the owner observed his part of the agreement not to pay any money to the contractor as long as the material was unpaid. The mechanics' lien law confers special privileges on the contractor and sub-contractor, and we ought not to hold that the parties waived their rights unless the language of the agreement clearly admits of such interpretation. If we accept the defendant's view, that the sub-contractor has no lien, the owner may secure a valuable building without paying a dollar for the structure. The contractor may sublet the different parts of the work and be unable to pay the workmen and materials; he can not recover against the owner because, under the agreement, he is entitled to payment only when such bills are discharged; the sub-contractor has no personal claim against the owner and he can not proceed against the building because he has no lien; the result follows that the owner pays nothing for his house. The language of the agreement does not drive us to such an interpretation, and we can not accept it.

Again, this provision of the written agreement was nothing more than a declaration of the existing law. The contractor was to have no money so long as the obligations contracted by him were unpaid. In *Chambersburg Manufacturing Company vs. Hazelet*, 3 Brew., 105 (affirmed by the Supreme Court), and *Lay vs. Millette*, 1 Phila., 513, it was held that the contractor's claim must be postponed in favor of those to whom he is personally responsible. We conclude that the sub-contractor has not lost his right to lien by reason of the written contract between the owner and Mr. Kitzelman. The very purpose of withholding the money from the contractor was to provide for the liquidation of such liens.

It is further contended that if this lien is enforced the owner will be compelled to pay for her house more than the contract price. This may be so; but she can blame no one but herself. If she paid the contractor the full price agreed upon before the six months for filing liens expired, she did so at her peril. She can not be compelled to pay more than the contract price if she takes proper steps to protect herself in her payments, but she can not pay the contractor or some of the material men in full and then give that as a reason for her refusal to pay other material men anything at all. Under the evidence, the materials furnished were proper, necessary, and actually used in the structure, and as the claimant had a right to lien he is entitled to compensation. If the cost of the house is in excess of the contract price, the sub-contractor may be compelled to take less than his full bill and *prorate* with the other claimants, but he can not be entirely excluded from participating in the distribution of the fund set apart by the owner for the payment of the house. The defendants offered to show that the full contract price was paid to the contractor; but, as already stated, the contractor was not entitled to any money under the special agreement or under the law until the sub-contractors entitled to liens were paid in full. Payment to the paramount contractor is no defence against a sub-contractor. "Where the claimant is a sub-contractor, it is no defence for the owner of the building to show that he has fully paid the party with whom he contracted": *Fahenstock vs. Wilson*, 95 Penna. St. R., 304. If the offer had been to show that the owner had paid all claimants *pro rata*, and such payments amounted to the full contract price, the defence would have prevailed.

And now, September 1, 1890, the reasons for a new trial are dismissed and the motion is overruled.

WILLIAM RIDING VS. JOHN L. BURKERT AND ABRAHAM P. WALTERS.

Where the defendant in whose favor an award of arbitrators was made during adjournment, invited one of the arbitrators to a hotel and treated him, the award will be set aside, although it does not appear affirmatively that they had any conversation upon the subject-matter of the suit.

RULE to set aside award of arbitrators. 52, March T., 1889.

Henry U. Brunner, Esq., for plaintiff.

I. P. Wanger and Walter S. Jennings, Esqs., for defendant.

Opinion of the court by WEAND, J., March 4, 1889.

In this case the arbitrators had met and adjourned until two o'clock for a further hearing, at which time W. R. Gilbert, one of their number, did not appear. By consent, Walters, one of the defendants, went in search of him. On their way to the arbitration room Walters invited Gilbert to take a drink at the Montgomery House, Walters paying for the drinks. It does not appear affirmatively that they had any conversation about the subject-matter of the suit; but we think that the mere fact of the treating was so grossly improper as to require us to set aside the award.

In road cases this court has uniformly held that treating or feasting the viewers was sufficient ground to set aside the report. It may be that it was an entirely innocent act in itself; but upon grounds of public policy the courts ought to set their seal of condemnation upon a practice which at once excites suspicion as to the motive and naturally moves the recipient of a gift or treat to incline toward the giver. After an arbitrator or juror is sworn in a cause, the parties should never approach him for conversation upon the subject-matter of the case; nor ought anything to be done by the one to the other which would have the appearance of a bid for his favor. The fact that all three of the arbitrators signed the award does not cure the difficulty, for we can not tell what influenced their decision.

And now, March 4, 1889, the award of the arbitrators is set aside.

Vol. VI.—37.

Court of Quarter Sessions of Monroe County.

ROAD AND BRIDGE VIEWERS.

The act of May 8, 1889, providing for the appointment of three road or bridge viewers, should be adopted in practice to the general road law of 1836, and the general act of 1874 in counties having no local laws and in counties having local laws but not inconsistent therewith; and, while all of the viewers must convene, a majority may decide.

The act does not apply in case of an application by the burgess and town council of a borough for appointment of viewers to assess damages for injury, etc., in opening streets, under the act of April 22, 1856, the title to the act of 1889 being "An act fixing the number of road and bridge viewers."

As respects bridges, the act has reference to such as are wholly within the territorial limits of the several counties. In case of bridges over creeks on the line of adjoining counties, the act of 1836, Sec. 46, provided for the appointment of half of the viewers by the court of each county. This can not be done under the act of 1889; the act of 1836 is therefore still in force as to such bridges.

PETITIONS for appointment of road viewers.

Opinion of the court by DREHER, P. J., July 8, 1890.

We have before us several petitions for the appointment of road viewers, and the question arises whether three viewers are to be appointed under the act of Assembly of May 8, 1889, P. L. 129, or six, as heretofore, under the general road law of 1836.

The act of 1889 is entitled "An act fixing the number of road and bridge viewers," and is contained in one section, as follows: "That in all proceedings to lay out or vacate a public or private road, or to assess damages, as provided by law, to fix the site of a county bridge, and to accept the same when repaired or completed, according to existing laws, the viewers, reviewers, etc., shall consist of three fair, judicious and impartial persons, one of whom shall be a surveyor, to be appointed as now provided by law. This act shall not apply to counties having local laws inconsistent herewith."

The evident intention of the Legislature was to make this act applicable to all counties, whether having local laws or not, if such local laws were not inconsistent therewith.

We have two special or local laws in Monroe county. First, is the act of April 6, 1843, P. L. 177, for Washington, Mercer and Fayette counties, extended to Monroe by act of April 6, 1850, P. L. 395, the second section of which provides that if the viewers appointed to locate a public road decide in favor of the road they shall en-

Road and Bridge Viewers.

deavor to procure releases from owners of the land through which the road passes, or if the owners refuse to release then to assess the damages and make report, signed by a majority of the viewers present, together with all releases. By the third section the court is directed to examine the amount of damages, and if it shall appear to the court that the damages are so small that the public interest will be subserved by paying the damages and opening the road, the court shall decide accordingly; but if the court shall be of opinion that the necessity of the road will not justify the county in paying the damages, then the court shall refuse to confirm the road. Provided, that if any person shall pay the damages, the road may be confirmed as heretofore. Second, we have the act of April 22, 1858, P. L. 464, for Northampton county, extended to Monroe by act of March 24, 1859, P. L. 233, which simply provides that a majority of the viewers to lay out or vacate a road shall be selected from the citizens of the township or townships through which the same may pass; and that the damages from the opening of any public road shall be paid by the respective townships or boroughs in which the same may be located; and the supervisors and town councils are authorized to levy a tax for the payment of the awards or damages, after the same shall have been affirmed by the court.

Is there any inconsistency between the local acts of 1843 and 1858 and the general act of 1889? Neither of the local acts fixes the number of viewers. As to the number, the general road law of 1836 directed that six viewers should be appointed, and the general act of 1889 simply fixes the number at three instead of six; and there is nothing inconsistent in this number with the provisions of the local acts mentioned. The majority of the viewers can still be appointed from the township or townships within which the road is located, as provided by the Northampton county act; and the three viewers can assess the damages as provided by the act of 1843, relating to the counties of Washington et al. It may here be observed that the provisions of that act are now substantially the general law, as respects the duty of viewers to endeavor to procure releases or assess damages. See act of May 14, 1874, P. L. 164, *Purd. Dig.* 1511, pl. 115.

It was the intention that the act of 1889 should be, and it certainly can be, adopted in practice to the general road law of 1836,

Road and Bridge Viewers.

and the general act of 1874 in counties having no local laws and in counties having local laws but not inconsistent therewith.

It will be observed that the act of 1889 does not say whether all the viewers must view, or whether a majority may lay out the road, fix site of bridge, and assess damages; but this omission does not affect the question of the application of the act to counties having local laws any more than those having no local laws, where the local law, in other respects, is not inconsistent therewith. The general road law of 1836 provided that no view should be valid unless at least five of the viewers should view, and at least four should concur in the report. Now, under the act of 1889 there can not be five viewers present, nor four to concur, and the question is whether two may lay out a road. That they must all be notified there can be no question. Under the act of 1836 all had to be notified, though the attendance of five and concurrence of four were sufficient. I think it is also clear that all the viewers must convene, though a majority, when all convene, may decide: Chadd's Ford Turnpike, 4 Binn., 481; State Road, 60 Penna. St. R., 330; Pathmaster's Accounts, 10 Luz. L. Reg., 58.

The question arises, though not now necessary to decide, whether the act of 1889 embraces the case of an application by the burgess and town council of a borough for appointment of viewers to assess damages for injury, and for contributions for benefits accrued in opening streets, under the act of April 22, 1856, Purd. Dig. 212, pl. 141. That act provides that seven freeholders of the borough shall be appointed. The language of the act of 1889 is that *in all proceedings* to lay out or vacate a public or private road, or to assess damages, to fix the site of a county bridge, etc. The title of the act is "An act fixing the number of road and bridge viewers." This embraces only viewers to view roads and bridges; and where the law imposes upon them to assess damages, they of course will make the assessment, being a power and duty incident to their appointment and character as such viewers. But it seems to me the act does not include the case of a street in a borough where the borough authorities are about to open it, and apply to the court for the appointment of viewers to assess the damages for properties injured, and for contributions against properties benefited, under the act of 1856; and we will, therefore, in such case, appoint seven freeholders, as provided for by that act.

Geiger vs. Borough.

Another question arises as respects bridges over creeks on the line of adjoining counties. The general road law of June 13, 1836, directed that in all cases of county bridges the number of viewers should be six; and as to bridges on county lines, the forty-sixth section provides that such bridges "shall be authorized in the manner provided in the case of other county bridges, except that the Court of Quarter Sessions of each county shall appoint three of the viewers, and that a report as aforesaid be made to the said courts respectively; and the said courts shall, together with the grand juries and commissioners of the respective counties, in all other respects, have and exercise a concurrent jurisdiction and discretion therein." The object or purpose of the above-recited section is to have one-half the viewers from each county. And if we hold that, in such case, there can now be only three viewers, each county can not appoint one-half the number of the joint view; but if each county appoint three, the viewers can act jointly as heretofore. It seems to me the proper construction of the act of 1889, as respects bridges, is that it has reference to such bridges as are wholly within the territorial limits of the several counties.

Court of Common Pleas of Montgomery County.

AMMON W. GEIGER VS. THE BOROUGH OF NORRISTOWN.

Where an alley-way appurtenant to a property is injured by a change in the street grade, such property owner may proceed to recover damages, under the act of 24 May, 1878, although the lot does not abut on the graded street except by the appurtenant alley or water-way.

Such matters as the act requires shall be set forth in the report of viewers must appear specifically; as to all other matters, the presumption is that the jurors duly considered them according to the legal requirements.

EXCEPTIONS to report of viewers assessing damages for change of grade.

Opinion of the court by SWARTZ, P. J., January 16, 1888.

It is true that the property of the petitioner does not front on Arch street where the change of grade was made, but the four feet

Vol. VI.—38.

Geiger vs. Borough.

wide alley which is a right of way and water-way appurtenant to the petitioner's property abuts on said Arch street.

The petitioner claims that the alley-way was injured or interfered with by the change of grade. A right of way appurtenant to a house is property, and any injury to it is injury to property. If the jury found that the alley way was injured or destroyed the petitioner is entitled to damages under Article 16, Section 8, of the Constitution: Junction Railroad vs. McCutcheon, 5 Cent. R., 759.

If the alley-way was interfered with by the destruction of the water way over it, and such interference was caused by the change of grade, then the injury was direct and the petitioner can recover damages: Snyder vs. City of Lancaster, 20 W. N. C., 184.

The exceptants complain because the report fails to state that the viewers made "just allowance for the advantages which may have resulted." The act of 24 May, 1878, does not require that such fact should be set forth in the report. This act is unlike the general road law of 1836, which prescribes what the report shall contain. Such matters as the act requires shall be specifically set forth must appear in the report; as to all other matters, the presumption is that the jurors duly considered them as required by the law: Spear's Road, 4 Binn., 174; Chad's Ford Road, 5 Binn., 481; App's Road, 17 S. & R., 388.

The report, however, shows that the viewers considered all necessary matters. They say: "We proceeded to view the premises to examine into the damages done by the alleged change of grade, having due regard and making just allowance for the advantages which may seem likely to result to the owner"; that is, they not only considered the damages done, as shown by the present advantages and disadvantages, but also allowed for future benefits likely to result.

The exceptants failed to offer any evidence showing non-performance of duty enjoined upon the jurors.

And now, January 16, 1888, the exceptions are dismissed, the report is confirmed, and judgment entered thereon with costs.

Orphans' Court of Montgomery County.

ESTATE OF ISAAC WISLER, DECEASED.

The law of the domicile of the decedent governs in the distribution of personalty.

Where a person is absent and unheard of for seven years, and the facts proven show a presumption of death, distribution of the estate of such absent person should not be had without an administration.

EXCEPTIONS to the auditor's report making distribution of the funds in the hands of John H. Wisler, trustee for Tobias H. Wisler.

William F. Solly, Esq., for exceptants.

Franklin March, Esq., contra.

Opinion of the court by SWARTZ, P. J., September 15, 1890.

Under the will of Isaac Wisler, deceased, the sum of \$1,924.83 was paid into the hands of John H. Wisler as trustee under said will, to pay the net income of said amount half yearly to Tobias H. Wisler during his natural life, and after his death to pay the principal sum to the children of the testator. The trustee filed his account in the Orphans' Court, showing that there is a balance in his hands of principal and interest amounting to \$2,566.02.

Henry H. Wisler, and others, children of said Isaac Wisler, deceased, petitioned the court for the appointment of an auditor to distribute said fund, the allegation being that Tobias H. Wisler was dead.

The evidence taken before the auditor shows that Tobias H. Wisler was not heard of since May 21, 1881; that diligent search and inquiry were made for him without success. Under the facts proven the presumption of life as to Tobias H. Wisler ended at the expiration of seven years from the time he was last known to be living; that is, on May 21, 1888, the presumption of death arose. Very little of the income from the trust fund was paid over to Tobias H. Wisler. How shall this income be distributed? was the main contest before the auditor.

Tobias H. Wisler was married in Ohio, and his wife is still living in said state. They had no children. The wife contends that under the facts shown her husband's domicile was in Ohio when he was last heard of, while the brothers and sisters of Tobias claim

Estate of Isaac Wisler.

that his domicile was in Montgomery county, Pennsylvania. The auditor finds that the only estate left by Tobias H. Wisler consists of personalty, and was in this county at the time of his death; that distribution should therefore be made in this court whether he died in Ohio or Pennsylvania. This is in accord with the provisions of the act of March 15, 1832, declaring that if the decedent has no residence within the commonwealth at the time of his death the register of the county where the principal part of the goods and estate of such decedent shall be, must grant the letter of administration. The auditor then proceeds to make distribution according to the intestate laws of Pennsylvania without first determining the domicile of the decedent. The law of the domicile governs the distribution, and how could the auditor apply the intestate laws of Pennsylvania without first determining that Tobias H. Wisler was domiciled in Pennsylvania at his death?

Counsel for Mrs. Wisler and counsel for the brothers and sisters of Tobias H. Wisler agreed before the auditor that if distribution could be made in this court, the estate of Tobias H. Wisler or the income in the hands of the trustee should be distributed to the widow and heirs without the intervention of an administrator.

This, we think, is an agreement that the auditor should have disregarded; first, because there is but a presumption of death, and the estate should not be distributed without due regard to all the legal proceedings calculated to protect the estate and the distributees, and especially the persons indebted to the estate; and secondly, as the presumption of life continued to May 21, 1888, how can the heirs, who heard nothing of him during these seven years, say he died leaving no debts. "The presumption of death as a limitation of the presumption of life must be taken to run exclusively from the termination of the prescribed period, so that the person must be taken to have then been dead and not before": *Burr vs. Sim*, 4 Wharton, 170. "If there be no debts to pay and no distribution needed, administration is not indispensable": * * * 26 W. N. C., 70 (*Roberts vs. Messenger*); *McLean vs. Wade*, 53 Penna. St. R., 146. But it was never intended that this rule should be applied to cases similar to the one in hand. The property of a man who has not been heard of for seven years ought not to be placed beyond his reach by a method so simple and speedy. The law is careful to protect property of absent parties. Payment to the ad-

Cummings vs. Young et al.

ministrator of the estate of such absent person is no defence to an action by the supposed decedent should he appear after letters are taken out and payment is made to the administrator: Devlin vs. Commonwealth, 101 Penna. St. R., 273.

The act of 24 June, 1885, no doubt was passed to protect the property of absent persons, and at the same time provides a method for the protection of those who may distribute the assets of such supposed deceased person. The act also protects debtors in the payments they may make to such administrator.

Instead of referring back the report to the auditor to ascertain the domicile of Tobias H. Wisler, we deem it best for the protection of the property, trustee, and others, that an administrator should be raised. Whether such administration is original or ancillary will depend upon the question of domicile. In directing the estate of the absent *cestui que trust* to go into the hands of a duly appointed administrator we follow the decree made in Levy's Estate, 6 Phila., 122.

And now, September 15, 1890, the distribution made by the auditor is set aside and the matter is referred back to him for further proceedings in accordance with the foregoing opinion.

Court of Common Pleas of Montgomery County.

THOMAS CUMMINGS, DEFENDANT BELOW AND PLAINTIFF IN ERROR,
VS. CHARLES D. YOUNG, PHOEBE D. WILKINSON AND MARY D.
TYSON, PLAINTIFFS BELOW AND DEFENDANT IN ERROR.

In a proceeding under the landlord and tenant act of 1772 it is not necessary to return the evidence with the proceedings. Under said act the process can be removed to court only when the tenant shall allege that the title is claimed under a right since the commencement of the lease, by descent, deed or under the will of the lessor.

An affidavit claiming title under another, and not stating how he acquired his title, is not sufficient.

Geo. N. Corson, Esq., for plaintiff in error.

Wanger & Knipe, Esqs., for defendants in error.

Cummings vs. Young et al.

Opinion of the court by WEAND, J., September 15, 1890.

This is a proceeding under the landlord and tenant act of 1772, and comes before us on a certiorari to review the proceedings of the justices.

The first exception is that "the proceedings are illegal from the commencement." This is such a general exception that it might be dismissed without further notice, but we have examined the whole record and can discover no error. It is also complained that the evidence is not returned or made part of the finding; but in *Bedford vs. Kelly*, 61 Penna. St. R., 491, it was held that the record of the magistrate in such case is an inquest of facts resulting in a judgment, and the testimony is not set out in the finding.

It is claimed also that the plaintiff's affidavit of title should have stayed the proceedings. The affidavit alleges that the title to the land is in dispute and claimed by the affidavit as grantee of Jno. H. Klinepeter et al., by deed executed since the lease, but does not set forth how his grantors had title, nor that it was "in virtue of a right or title accrued or happening since the commencement of the lease, by descent, deed, or from or under the last will of the lessor."

In *Koontz vs. Hammond*, 62 Penna. St. R., 177, and *Cunningham vs. Gardner*, 4 W. & S., 120, it was held that the process under the act of 1772 can only be removed when the tenant shall allege that a title is thus acquired.

It is not easy to see why a deed from Klinepeter should confer such a title upon Cummings as would defeat these proceedings, unless Klinepeter himself had such title acquired since the lease.

And now, September 15, 1890, exceptions are dismissed and proceedings sustained.

JOHN FREYMAN VS. JOHN M. BEAN AND A. E. BEAN, WITH NOTICE
TO JAMES HUSTON, TERRE TENANT.

On a sci. fa. sur judgment against several defendants, where one defendant obtains a verdict by a jury, and the plaintiff recovers against the others, the defendant who obtains a verdict is not entitled to a judgment for costs against the plaintiff.

A fi. fa. having issued against a plaintiff for costs, he paid the same to the sheriff after a levy made; on the return day plaintiff moved to set aside the fi. fa. as being improperly issued. *Held*, that as the writ was executed it could not be set aside and that plaintiff not having moved to have it set aside before return day and having paid the money, though under protest, he recognized its validity so far as making the money was concerned.

SUR rule to strike off judgment and set aside fi. fa.

Slough & Freeman, Esqs., for rule.

Henry Freedley, Jr., Esq., contra.

Opinion of the court by WEAND, J., September 15, 1890.

A sci. fa. sur judgment was issued at the instance of John Freyman, plaintiff, vs. John M. Bean, with notice to A. E. Bean and James Huston, terre tenants.

Huston pleaded that his land had been discharged from the lien of the judgment by reason of a sheriff's sale. The verdict was in favor of plaintiff as against John M. Bean, the original debtor, and in favor of A. E. Bean and Huston. Huston paid the verdict fee, and had judgment entered on the verdict in his favor. He then issued a fi. fa. for costs, but filed no bill of costs, nor were any taxed to him. The court made no order in the matter. The costs endorsed on the fi. fa. were the prothonotary's and crier's costs and the judgment fee. The fi. fa. came to sheriff's hands April 15, 1890, 3 p. m. Levy made upon personal property April 16, and same day sheriff received costs on the writ, which was afterwards returned. The return day was June 2, 1890. On that day plaintiff took a rule to show cause why the judgment for costs should not be set aside and the fi. fa. stayed.

Under the cases of *Maus vs. Maus*, 10 W., 87; *Steele vs. Lineberger et al.*, 72 Penna. St. R., 239; and *Swallow vs. Ives*, 4 Lanc. Law Rev., 300, as the law now stands, on a writ of sci. fa. sur judgment against several defendants where one defendant recovers a judgment by verdict and the plaintiff succeeds against the others, the defendant so obtaining a verdict is not entitled to costs. This results from the construction placed upon the English statutes in

Thomas vs. Coal Company.

force in this commonwealth, by virtue of which costs are alone recoverable in certain cases. Had the court therefore been asked to enter judgment for costs in favor of Huston it would have been refused. No such judgment was entered, and hence the plaintiff's petition to strike off the judgment for costs must be refused, as there is no such judgment in the case. Can we set aside the fi. fa.? When the sheriff made his levy the plaintiff paid him the costs, accompanying the payment with a protest in writing that the execution was improperly issued, and notifying him not to make distribution unless directed to do so by the court. The sheriff was bound to obey the directions of his writ, which was in proper form. He therefore properly made his levy, and he had the right to receive the money from the plaintiff. The plaintiff had no right to make any conditions so far as the sheriff's execution of the writ was concerned, and, therefore, in this proceeding the protest can have no weight. If the execution was improper the plaintiff should have applied to the court for relief; and not having done so his payment recognized the writ, and he can not now have it set aside. His application also comes too late. The writ was executed and lost its vitality. The money was paid April 19th, and from that moment the fi. fa. was dead. The petition to set it aside was filed on the return day, at which time, in the absence of evidence to the contrary, we must assume that it was returned.

And now, September 15, 1890, motion to strike off judgment and set aside fi. fa. overruled.

Court of Common Pleas of Luzerne County.

THOMAS VS. THE WEST END COAL COMPANY.

A referee is not bound to decide a conflict of evidence upon an immaterial question of fact.

EXCEPTIONS to referee's report.

D. M. Jones, Esq., for plaintiff.

J. T. Lenahan, Esq., for defendant.

Opinion of the court by RICE, P. J., June 9, 1890.

It is the duty of a referee to report specifically upon all material questions of fact, and it is contended that the referee in this

Township of Moreland vs. Penna. R. R. Co.

case has failed to observe this rule, because he has not reported whether there was sufficient ventilation. The materiality of this question depends upon the question whether it was the defendant's duty to furnish ventilation. But the referee, after a careful and painstaking consideration of this question, concludes that it was not the defendant's duty, either by contract or by custom or usage. We have carefully examined the grounds upon which this conclusion rests and are of opinion that it was fully justified by the preponderance of evidence. It follows that the question, whether artificial ventilation was necessary to enable the plaintiff to complete his contract, was immaterial. The referee's report is very full, and seems to us to cover all of the points raised by the exceptions.

The exceptions are overruled, the report of the referee is confirmed, and judgment is directed to be entered thereon in accordance with his findings.

Court of Common Pleas of Montgomery County.

THE TOWNSHIP OF MORELAND VS. THE PENNSYLVANIA R. R. CO.

An injunction will issue to restrain a railroad company from changing the site of a public road unless some reasonable necessity for such action is shown.

The mere difference in expense between a fill and a bridge is not sufficient justification for such action unless it is also shown that the cost would be unreasonable. In this case the court was of opinion that the proposed new road would not fill the requirements of the act of Assembly, and that the action of the railroad company was unreasonable and not required by the necessities of the case.

MOTION for preliminary injunction. 8, June T., 1890.

James B. Holland and *John M. Dettra, Esqs.*, for plaintiff.

Charles H. Stinson, Esq., for defendant.

Opinion of the court by WEAND, J., September 19, 1890.

In the construction of their railroad the defendants find it necessary to cross a public road in Moreland known as the "Pioneer road." The plaintiffs in the fourth section of their bill complain that "the crossing of said public road by said defendants in the manner

proposed, in the construction of their railroad, will entirely destroy the use of said public road as a public highway," etc. Of course, if this allegation is true, the defendants must be enjoined unless they propose to supply a new road in place of the one thus destroyed, and show some reasonable necessity for such action. It is admitted by their affidavits that they propose to change the site of a portion of the "Pioneer road," and to cause the part thus destroyed to be reconstructed; but we fail to see any reason for such action, and are not satisfied that such reconstruction will be upon the most favorable location and in as perfect a manner as the original road. An arbitrary or unreasonable exercise of the power here proposed to be exercised can be restrained by the court, and in such cases the railroad company must show some reasonable ground for the exercise of the right. In the complainant's bill it is alleged that the crossing will be about twenty-five feet above grade, allowing a bridge.

The proposed substituted road does not run parallel with the old road, but will compel travelers going to Bucks county to pass one thousand feet on the Byberry road in a direction at right angles to that from which they were going, and then after crossing the railroad by an under grade bridge retrace their steps one thousand and eighty feet on the supplied road and alongside the railroad to again reach the "Pioneer road." The only reason given for this action of the defendants is that they have constructed an under grade bridge at a point on the Byberry road at the distance of about nine hundred feet from the Pioneer road, and that at the point complained of there is a very heavy fill in said public road, so great as to impede public travel across the same. The public, however, do not complain of any difficulty in the public road. The fill is caused by defendants; and if it is true, as alleged by complainants, that the railroad will cross twenty-five feet above grade, the only difference to the defendants would be that between a fill and a bridge. The effect upon the public, and especially upon the school children, will be to compel them to travel very much out of their way without any corresponding advantage to the defendant except in expense. As the road is but thirty feet wide at this point, this saving of expense is not sufficient in our opinion to justify defendant's action.

And now, September 19, 1890, a preliminary injunction is awarded as prayed for, restraining the said defendant, its agents, servants and employees from constructing their railroad across the

Township of Moreland vs. Penna. R. R. Co.

Pioneer road in any way whatever so as to prevent the full and free use and enjoyment by the public of said road; and also to restrain said parties from changing the site of said public road in the manner proposed by their affidavit and plan attached, plaintiff to give bond in \$2500.

THE TOWNSHIP OF MORELAND VS. THE PENNSYLVANIA R. R. CO.

There is nothing in the general railroad act of 1849 that requires the company to appropriate a highway longitudinally in order that it may acquire the right to change the site of a public road. What will justify the removal and reconstruction of a public road is a question to be settled in the exercise of a sound discretion of the railroad company; and unless the power thus committed to the company is abused or used without due regard to the public interest, it is conclusive of the question. To avoid a diagonal grade crossing at the point where two public roads intersect the railroad company changed the site of the highways and supplied the parts of the public roads destroyed. *Held*, that under the facts in the case the court could not declare that there was any abuse of the discretion vested in the railroad company.

RULE to show cause why a preliminary injunction should not be granted restraining the defendants from changing the site of a portion of two public roads. 7, June T., 1890.

James B. Holland and John M. Detira, Esqs., for plaintiff.

Charles H. Stinson, Esq., for defendant.

Opinion of the court by SWARTZ, P. J., September 20, 1890.

The defendant company in the construction of their Trenton branch railroad cross the York turnpike in Moreland township by an under grade bridge. About three hundred and fifty feet west of this crossing two public roads intersect at right angles. The new railroad as located passes over these highways at their intersection.

The defendants propose to occupy so much of said intersecting roads as is necessary for the construction of their railroad. To supply the parts so taken they are reconstructing at their own expense connecting roads leading into said York turnpike. Under the proposed reconstruction the public roads are vacated at their intersection and within the limits of the company's right of way.

The defendants assign as a reason for this change of site their inability to pass over said roads either by a grade crossing or by the construction of a bridge. They allege that a grade crossing would make the approaches in the public roads steep and dangerous; that

an over grade bridge would necessitate a cut in the public highways from which the water could not be drained.

According to the plaintiff's affidavits the grade of the railroad as located is eight or ten feet above the grade of the highways at their intersection. This point of intersection is in a depression, and the public roads descend to it as the lowest ground.

If the highways when depressed can not be drained, their use is practically destroyed. Grade crossings with steep approaches in the highway from either side of the railroad are dangerous and very undesirable. With a loaded wagon it will be difficult to stop upon the approach, and still more difficult to start and move rapidly after such stoppage. To stop at the base of the approach to look and listen affords little protection where flying express trains pass frequently. This difficulty in drainage and danger is increased when we remember that the railroad crosses the two roads at their intersection. That the highways cross the railroad tracks diagonally increase the danger still more.

The affidavits before us establish the fact that the defendants encountered a difficulty in their efforts to cross these public roads. They decided that it was necessary to change the site of the roads. For their authority in the proceedings they rely upon the thirteenth section of the general railroad act of 1849, which reads as follows: "If any such railroad company shall find it necessary to change the site of any portion of a public road or turnpike, they shall cause the same to be reconstructed forthwith at their own proper expense on the most favorable location and in as perfect a manner as the original road." There is nothing in this provision that requires the company to appropriate a highway longitudinally in order that they may acquire the right to change the site of the public road: Appeal of Manheim Township, 22 W. N. C., 149. The reasoning of the court in Penna. Company's Appeal, 128 Penna. St. R., 509, leads to the same conclusion.

Whether the defendants abused the discretion vested in them is therefore the only question before us. What will justify the removal and reconstruction of the public road is a question to be settled in the exercise of a sound discretion of the railroad company. "Unless the power thus committed to the company is abused or used without due regard to the public interest, it is conclusive of the question": Appeal of the Penna. Railroad Co., *supra*.

Township of Moreland vs. Penna. R. R. Co.

The affidavits before us clearly show that to preserve the highways intact the railroad must cross at grade or the public roads must be carried under the railroad tracks. If the railroad grade is eight feet above the grade of the highways the public roads must be depressed at least six or eight feet to give sufficient headway for passing teams to go under a railroad bridge. We find no answer to the company's allegation that such depression, by reason of the drainage, is not reasonably practical. A grade crossing seems, therefore, to be the only possibility remaining. This may be reasonably inferred even from the plaintiff's affidavits, for in them it is said that a grade crossing would be more desirable than a change in the road site. Because a grade crossing is possible it does not follow that the company must adopt it. "The question in any given case is not what is possible but what is reasonably practicable." The company proposes to avoid a grade crossing; and certainly we shall not compel an abandonment of this purpose unless the law and facts in the case demand such a course at our hands. For the reasons already given this diagonal grade crossing at the intersecting roads would be very dangerous, and by reason of the ascent to the railroad tracks very inconvenient and perhaps inaccessible with heavily loaded teams. How can we say under such circumstances that the company abused its discretion when it determined that a grade crossing was not reasonably practicable.

It may be that a change in the railroad grade would save the highway; but the plaintiff fails to show that such change is feasible, nor do we see how the court can determine this question. In *Parks' Appeal*, 64 Penna. St. R., 137, it was held: "Neither the court below nor this court have any right to interfere with the location made by the company." And *Struthers vs. Railroad Co.*, 87 Penna. St. R., 282, is to the same effect.

If the company fails to properly supply the roads destroyed as required by the act giving the authority to change the site, the plaintiff is not without remedy. The act clearly points out the duty of the railroad company. The act does not require a reconstruction of the road before the old is occupied. The act nowhere declares that the making of the new road shall precede the taking possession

Bevan & Bro. vs. Thackara et al.

of the old one: Danville & Hazleton R. R. Co. vs. Commonwealth, 73 Penna. St. R., 29.

And now, September 20, 1890, the application for a preliminary injunction is refused and the rule in this case is discharged.

WALTER BEVAN AND H. C. BEVAN, PARTNERS, TRADING AS WALTER BEVAN & BRO., vs. A. M. THACKARA AND ELEANOR S. THACKARA, HIS WIFE, OWNERS OR REPUTED OWNERS, AND L. W. KITZELMAN, CONTRACTOR.

A lien filed by a sub-contractor against a dwelling-house and the ground upon which it stands, and so much other ground as is necessary for the ordinary and useful purposes of the house, is sufficient, although part of the materials went into a stable which was an appurtenance to the dwelling necessary for the enjoyment of the same, the bill of particulars setting forth that the materials were furnished to the house and stable.

MOTION for judgment in favor of the defendants, *non obstante veredicto*, on the question reserved.

B. E. Chain and B. Percy Chain, Esqs., for plaintiffs.

Wm. H. Peace and Bickel & Hobson, Esqs., for defendants.

Opinion of the court by SWARTZ, P. J., October 6, 1890.

The plaintiffs filed a mechanics' lien against the defendants. A *scire facias* was issued on this lien, and upon the trial of the issue we reserved the question whether the plaintiffs can recover on their lien upon the following facts: "On July 15, 1887, L. W. Kitzelman contracted in writing with A. M. Thackara, the husband of Eleanor S. Thackara, for the erection of a dwelling-house, and on November 11, 1887, made a similar contract with said husband for the erection of a stable. The lot upon which these buildings were erected was owned by the wife. The plaintiffs furnished materials continuously upon the order of the contractor, and they were used part in the construction of the house and part in the construction of the stable. The plaintiffs had no knowledge that there were separate contracts for the erection of the respective buildings, nor that the contracts were in writing; but they knew that Kitzelman was building both the house and the stable. The building of the house was commenced in July, 1887, and completed about February 11, 1888. The stable was

Bevan & Bro. vs. Thackara et al.

commenced in November, 1887, and completed about February 10, 1888. Under the findings of the jury the value of the materials furnished and used with interest was \$999.68, the materials were reasonably necessary for the erection of the house and stable, the buildings were necessary for the improvement of the wife's separate estate, the contract was made with the knowledge and consent of the wife, the materials were furnished with her knowledge and assent, the stable was appurtenant to the house and was necessary for the convenient enjoyment of the house and lot."

The body of the lien sets forth that the claim is filed "against the building hereafter mentioned, the ground covered by said building, and so much other ground immediately adjacent thereto and belonging to the said Eleanor S. Thackara as may be necessary for the ordinary and useful purposes of the same." Further on in the lien the claim proceeds: "The said building is a dwelling-house two stories in height." Then follows a full description of the dwelling-house. The lot upon which the building is erected is described.

In the bill of particulars attached and made a part of the lien the charges are headed as follows: "L. W. Kitzelman, contractor. A. M. Thackara and wife, owners. House and stable near Rosemont, Pa. Bought of Walter Bevan & Bro."

The bill of particulars does not designate what materials went into the stable or what materials were used in the dwelling; but this bill gives the kind and quantity of materials furnished and the times when furnished, together with the prices.

The question raised under these facts is whether the lien is sufficient to sustain a recovery.

The plaintiffs fail to designate or prove what part of the materials was furnished to the respective buildings, and refer to the stable by name in no other way than that given in the bill of particulars.

Both buildings were erected by the same contractor, and were in process of construction at the same time; one was commenced earlier than the other, but both were finished about the same date. They were built upon the same lot, and the stable, according to the finding of the jury, is appurtenant to the house and necessary for the convenient enjoyment of the house. The lot contains nearly two acres, and is situate in the township of Lower Merion, not in a city or borough. According to Lauman's Appeal, 8 Penna. St. R., 473,

this extensive dwelling-house is the principal building, and the stable is but an appendage built expressly with a view to the more perfect enjoyment of the house. The two buildings are constituent parts of a whole incapable of separation without injury.

If the claimants in this case had furnished materials to the house alone, and had filed their lien against the dwelling-house, such lien when enforced would attach against the stable. "Each of all the buildings erected as one tenement and appurtenances is liable for the work done on the others. All the property was intended to be improved by each building, and all are subject to the lien": *Nelson vs. Campbell*, 28 Penna. St. R., 156. If then the claim filed against the principal building for work done upon it gives the claimant a lien upon all the buildings that are to be treated as a unit, why is not such claim sufficient where the claimant does work upon all the buildings? It may be answered that the owners ought to be informed, in the case of a sub-contractor, of the extent of his claim, so that they may know what they are to meet in the sci. fa. But in the lien before us this information is given for the claimants' bill of particulars, which is part of the lien, and shows that the lumber charged went part into the house and part into the stable.

Again, the claim in this lien is broad enough to cover the stable. The lien is filed against the house and ground upon which it stands and so much other ground as is necessary for the ordinary and useful purposes of the house. As the stable is appurtenant to the house and necessary for its enjoyment, the owners were bound to know that the claim as filed embraced the stable and the ground upon which it stands. The stable is not described; but this is not necessary, if it is actually included in the language of the lien as filed. There are other matters of description in this lien that are sufficient to identify the property; and identity is all that the description is required to establish.

And now, October 6, 1890, the motion for judgment, *non obstante veredicto*, is overruled, and judgment is entered in favor of the plaintiffs upon the verdict of the jury.

WALTER BEVAN AND H. C. BEVAN, PARTNERS, TRADING AS WALTER BEVAN & BRO., vs. A. M. THACKARA AND ELEANOR S. THACKARA, HIS WIFE, OWNERS OR REPUTED OWNERS, AND L. W. KITZELMAN, CONTRACTOR.

Where materials are furnished and used in the improvement of a married woman's property by her direction, or with her knowledge and assent, and are reasonably necessary, the law gives a lien on her property.

A provision in the contract for the erection of the building that the owner shall pay the contractor upon certificates of the architect, upon sufficient proof that all claims on the building for work or materials up to the time of payment are discharged, does not take away the right of a sub-contractor to file a mechanics' lien.

The owner can not be compelled to pay more than the contract price for the building, if he takes proper steps to protect himself in the payments that he may make.

MOTION and reasons for a new trial.

B. E. Chain and B. Percy Chain, Esqs., for plaintiffs.

Wm. H. Peace and Bickel & Hobson, Esqs., for defendants.

Opinion of the court by SWARTZ, P. J., October 6, 1890.

We answer the motion and reasons for a new trial by repeating in part what was said in a similar motion by the same parties in the case of Bodey & Livingston against these defendants.

Kitzelman, the contractor, entered into a written agreement with Alexander M. Thackara, the husband of Eleanor S. Thackara, for the erection of a dwelling-house. Mrs. Thackara was the owner of the land upon which the house was erected. Her counsel now contend that there was no proof sufficient to go to the jury showing any liability on her part to the plaintiffs for the materials furnished in the construction of the building. The evidence discloses that Mr. Boyden was the architect. When Kitzelman called at the architect's office, prior to the execution of the contract, Mrs. Thackara was at the office examining the plans for the house. She called at the house frequently during its construction, and "gave directions to the contractor about anything she wanted done about the work." Another witness says: "Mrs. Thackara visited that building during its progress of erection for a while every day, and sometimes twice a day. When she was there she looked around and wanted things cleaned up. * * * She paid attention to the progress and character of the work while it was going on. She gave orders as to the performance of some work." She wrote letters to the other material men urging them to send on material without further delay.

Bevan & Bro. vs. Thackara et al.

This evidence, with the other facts and circumstances in the case, was sufficient to sustain a finding that the materials were furnished to her property by her direction or with her knowledge and assent; and this is all that the law requires where there is proof that the materials were proper for the improvement of her estate, necessary for such improvement, and actually used in the construction: *Einstine vs. Jamison*, 95 Penna. St. R., 407; *Forrester vs. Preston*, 2 Pitts., 298.

It is also contended that the claimant, being a sub-contractor, had no right to file a lien by reason of the provision in the written agreement with the contractor. The contract provides that "Thackara should pay Kitzelman upon certificates of the architect upon sufficient proof that all claims upon the building for work or materials up to the time of payment are discharged." This stipulation is unlike the provision in *Schroeder vs. Galland*, 26 W. N. C., 33. In the latter case the contractor agreed to build, finish and deliver the building to the owner "free of all liens and encumbrances, or any claims whatever that might arise under any action of the party of the second part or his legal representatives under this contract." This was held to be an agreement on the part of the contractor not to file any lien, and binding upon any sub-contractor.

In the case at bar the contractor might pay for work done and materials furnished, and then file his lien to secure for himself the privileges of such statutory lien. Suppose he is unable to pay the material men when the building is completed, may he not file his lien, protect his claim, and recover upon it as soon as the material men are paid and the certificate of the architect is obtained?

There is no stipulation against liens, but a provision that Kitzelman is to have no money until certain conditions are complied with. He may file his lien, but a *sci. fa.* is premature until the claims for work and materials are discharged. In *Campbell vs. Scaife*, 1 Phila., 187 (District Court of Allegheny), Lowrie, J., says: "The second plea does not deny the facts upon which the lien depends, but avers matters tending to show that the plaintiff ought not to have execution thereof. It avers that the time of payment has not yet arrived, from which the proper inference is that the *sci. fa.* is prematurely issued, and the prayer should be that the writ be quashed." An agreement not to receive pay until certain conditions are complied with is not a waiver of the right to file a lien.

Bevan & Bro. vs. Thackara et al.

As we read the provision in the contract, it was not to exclude liens but to protect the owner against the misapplication of money paid to the contractor. The owner's money was to be applied to the payment of bills contracted in the construction of the house. The provision in the contract was in the interest of the material man as well as for the benefit of the owner. The sub-contractor was bound to know the provisions of the contract, and an examination of the same would reveal to him that he could safely supply the material, for he was sure of his money, provided the owner observed his part of the agreement not to pay any money to the contractor as long as the material was unpaid. The mechanics' lien law confers special privileges on the contractor and sub-contractor, and we ought not to hold that the parties waived their rights unless the language of the agreement clearly admits of such interpretation. If we accept the defendant's view, that the sub-contractor has no lien, the owner may secure a valuable building without paying a dollar for the structure. The contractor may sublet the different parts of the work, and be unable to pay the workmen and materials; he can not recover against the owner because, under the agreement, he is entitled to payment only when such bills are discharged. The sub-contractor has no personal claim against the owner; and he can not proceed against the building, because he has no lien. The result follows that the owner pays nothing for his house. The language of the agreement does not drive us to such an interpretation, and we can not accept it.

Again, this provision of the written agreement was nothing more than a declaration of the existing law. The contractor was to have no money so long as the obligations contracted by him were unpaid. In *Chambersburg Manufacturing Company vs. Hazelet*, 3 Brew., 105 (affirmed by the Supreme Court), and *Lay vs. Millette*, 1 Phila., 513, it was held that the contractor's claim must be postponed in favor of those to whom he is personally responsible. We conclude that the sub-contractor has not lost his right to lien by reason of the written contract between the owner and Mr. Kitzelman. The very purpose of withholding the money from the contractor was to provide for the liquidation of such liens.

No testimony was offered to show that the defendants had paid the contract price for the erection of the buildings, and our comments upon this point were offered in answer to some remarks that

Cook vs. Hoffman et al.

were made in the hearing of the jury to the effect that full payment of the amount mentioned in the contracts had been made. The question of payment was not introduced in the trial of the cause.

The only other question raised by the reasons for a new trial is embraced in the motion for judgment *non obstante veredicto* on the point reserved. The judgment upon that motion will dispose of this exception.

And now, October 6, 1890, the motion for a new trial is overruled and the reasons are dismissed.

NEVILLE COOK VS. CLARA N. HOFFMAN, OWNER OR REPUTED OWNER,
AND WILLIAM H. NEAL, CONTRACTOR.

A mechanics' lien, defective in failing to set forth the nature and kind of work done and the time when finished, can be amended; but a mortgage attaching prior to the amendment will not be postponed to such amended lien.

If the mortgage is preceded by nothing other than the original defective lien, a sale upon a subsequent encumbrance will not divest the mortgage.

RULE to show cause why the lien should not be stricken off on application of The Real Estate Trust Company, a mortgage lien creditor of the owner.

March & Brownback, Esqs., for plaintiff.

Childs & Evans, Esqs., for defendant, Clara N. Hoffman.

See same case, reported *ante* 147.

Opinion of the court by SWARTZ, P. J., October 6, 1890.

We decided that the lien in this case was amendable as between the owner of the premises, Clara N. Hoffman, and the claimant, Neville Cook. The amendment was filed. It is therefore clear that we can not strike the lien from the record. But our action did not prejudice the rights of other lien creditors whose liens attached before the amendment was allowed.

The lien as originally filed was bad, because among other things it failed to set forth the nature or kind of work done or the kind and amount of materials furnished and the time when the materials were furnished. Prior to the act of 11th June, 1879, such defect could not be supplied by amendment: *Fahnestock vs. Wilson*, 95 Penna. St. R., 301.

Cook vs. Hoffman et al.

The second section of the act of 1879 authorized the court "to permit amendments conducive to justice and a fair trial upon the merits." The section, however, contained this proviso, that "no amendment so allowed shall have effect or prejudice the rights of *bona fide* purchasers for a valuable consideration without notice, or the rights of other lien creditors when such purchase has been made or such other liens would otherwise be prior if such amendment were not made or had not been allowed." This act was construed to operate prospective only: *Fahnestock vs. Wilson*, *supra*. Therefore the proviso was not made to protect the existing "other liens," but the "other liens" spoken of, referred to liens entered subsequent to the act of 1879. Under the proviso the rights of such other lien creditors remain as if no such amendment were made or allowed.

The mortgage of the Real Estate Trust Company is not prejudiced by this amendment; if the mortgage was a first lien before such amendment, it still holds that position. When the mortgage was entered of record the mechanics' lien was defective on its face; as it stood upon the record it was not enforceable against the premises covered by the mortgage. A mechanics' lien defective upon its face is a nullity, and a purchaser is not bound to notice it: *Bolters vs. Johns*, 5 Penna. St. R., 149. If this mortgage is preceded by nothing other than this original defective lien, a sale upon a subsequent encumbrance will not divest the mortgage: *Goepp vs. Gartsner*, 35 Penna. St. R., 130; *Harper's Appeal*, 4 W. N. C., 49. The mortgage creditor is protected by the record, and no better protection is needed.

-And now, October 6, 1890, the motion to strike off the mechanic's lien is refused and the rule is discharged.

Orphans' Court of Montgomery County.

APPEAL OF ELIZABETH HAWKINS.

Whether the court should award an issue to determine the validity of a will depends upon the test. Would the trial Judge after a careful review of all the testimony feel constrained to set aside a verdict against the proponents of the will obtained upon a fair and impartial trial, as contrary to the manifest weight of the evidence?

Undue influence to avoid the will must destroy the free agency of the testator at the time, and in the very act of making the testament.

An unlawful relation which affects testamentary disposition may constitute undue influence.

The unlawful sale of liquor by a legatee to an intemperate testator is not sufficient, under the circumstance in this case, to justify the awarding of an issue to try the validity of the will.

PETITION for an issue to be directed to the Court of Common Pleas.

Opinion of the court by SWARTZ, P. J., October 6, 1890.

Solomon Levis died testate in June, 1889. He made his will February 21, 1887. His estate is estimated to be worth between \$13,000 and \$14,000. By this will he gives \$5000 to his friend Judson J. Clayton, \$2000 to his cousin Helen D. Lloyd, and the residue to his niece Elizabeth Hawkins, wife of William Hawkins. The testator was a bachelor, and Mrs. Hawkins, the residuary legatee, was his only near relative. She contested the probate of the will upon the ground that the testator was not of sound memory and understanding, and upon the further ground that the legacy to Judson J. Clayton was obtained by undue influence. The Register decided against the contestant, and she now asks this court to award an issue to determine the questions raised in that contest.

In early life the testator was addicted to drink. This was a family weakness. His two brothers, Paul and Marshall, lived very intemperate lives. The testator reformed, and for about seventeen years abstained from intoxicating drink. He and his brothers lived near the hotel of C. S. Clayton, the father of Judson, the legatee, and during this period of abstinence he expressed great antipathy against this hotel and the persons there and elsewhere engaged in the sale of intoxicating liquor. In August, 1885, he returned to his old habit, and continued therein to his death. In January, 1886, he

Hawkins' Appeal.

made his home at the Clayton hotel, and lived there continuously with the exception of a short time spent in the city of Philadelphia. On his return from that city to the Clayton hotel he was taken with delirium tremens. His sickness continued for about six weeks, and during this period he was nursed by Judson, the legatee. He continued his excessive drinking, spending his money freely at the Clayton bar. He engaged in no business, sat in the bar-room, or remained about the premises. He was furnished with liquor over the bar from day to day. From these indulgences he was very often drunk, and at such times he was wild and very profane. Drink did not readily affect his locomotion, but made him loud and boisterous. Drink impaired his health, and, no doubt, to some extent impaired his mental powers. When sober he was always rational and competent to transact business. He was a man of considerable intelligence.

His money, save that received from the estate of his brother Paul, was safely invested in securities, the interest of which was payable semi-annually in Philadelphia. Paul's estate was not distributed until the spring of 1887—that is, subsequent to the time Solomon Levis, the testator, made his will. From the spring of 1887 to the time of his death the testator spent all the current income from his Philadelphia securities, together with about \$4000 of his share in the distribution of the estate of his brother Paul.

After making his home at the hotel he soon manifested strong friendship for Judson J. Clayton. He declared to others that Judson had shown great kindness to him. When the will was drawn he told the scrivener that Judson had been very good to him, took good care of him, and was the only friend that cared anything for him. Judson usually served out the drink to him, gave him liquor at intervals ranging from one-half hour to two hours, and stopped the drink on him when he thought Levis had enough. Judson accompanied him when he went to Philadelphia to collect his interest. Sometimes the testator gave the money to Judson to keep for him, and when money was needed to pay outside bills Judson would hand the money to the testator.

While at the hotel the testator expressed great dislike to William Hawkins, the husband of the contestant, giving as a reason for this feeling that William married her for her money. Mrs. Hawkins was educated by her uncle, the testator. He made her pres-

Hawkins' Appeal.

ents before marriage and also some few after marriage, but none within the last ten years. He never visited her at her home after her marriage, which occurred about fifteen years ago. Mrs. Hawkins testifies that her uncle declared to her that Mr. Clayton, the father of Judson, told him that William married her for her money.

When Mr. Levis came to the Clayton hotel he brought his papers with him and placed them in the custody of the elder Clayton. Mr. Clayton died in November, 1887. His widow then conducted the business for a short time. The property was sold, Judson becoming the purchaser and proprietor of the hotel.

Judson at the request of the testator took him to Mr. Hunter for the purpose of having a will prepared. In the presence of Judson the testator gave the scrivener the directions and provisions of the will. He was sober, and the will when finished was read over to him in detail. When Mr. Levis gave directions for the \$5000 legacy he turned to Judson and asked him whether that was not what he promised him. Judson answered that it was and that whatever he did was satisfactory to him, to which the testator replied that when he said a thing he generally tried to carry it out.

Two years and four months after the will was executed Mr. Levis died. Death was caused, or at least hastened, by the continuous excessive use of stimulants.

Does the testimony laid before us disclose a material dispute? The test to be applied is, Would the trial Judge after a careful review of all the testimony feel constrained to set aside a verdict against the proponents of the will obtained upon a fair and impartial trial, as contrary to the manifest weight of the evidence? *Graham's Appeal*, 61 Penna. St. R., 43; *Appeal of Knauss*, 114 Id., 10.

There is clearly no evidence upon which to sustain a finding that the testator was not of sound memory and understanding when the will was made. Some of the witnesses show that the mental faculties of the testator were more or less impaired by his indulgences. This is not sufficient to establish testamentary incapacity. If his mind and memory were sufficiently sound to enable him to know and to understand the business on which he was engaged at the time he executed the will, this is all that is requisite, although the memory may be imperfect and greatly impaired by age or disease: *Wilson vs. Mitchell*, 101 Penna. St. R., 495. The evidence is uncontradicted that the testator was sober when he made the will.

Hawkins' Appeal.

That he had sufficient mental capacity to make a will when in a sober condition can not be questioned under the evidence laid before us.

We do not understand that the contestant rests her case upon mental unsoundness, except so far as it may become an important element in considering the question of undue influence. In passing upon a question of undue influence the strength and condition of the mind may become a proper, indeed an essential, subject of inquiry, for although weakness when arising from age, infirmity or other cause may not be sufficient to create testamentary incapacity, it may, nevertheless, form favorable conditions for the exercise of undue influence: *Herster vs. Herster*, 122 Penna. St. R., 252.

The evidence discloses no proof of any direct undue influence. There is no evidence of any undue solicitations, artifice, fraud, threats, imposition or bad faith on the part of the legatee; no effort to bias the mind of the testator against the contestant or her family. True, the testator declared that the legatee's father told him that contestant's husband married her for her money; but this was a declaration of the testator, and can not be received as evidence of the fact: *Herster vs. Herster*, *supra*.

Undue influence to avoid the will must destroy the free agency of the testator at the time and in the very act of making the testament; it must be a present constraining influence operative at the time the will is made: *Eckert vs. Flowry*, 43 Penna. St. R., 46; *Trost vs. Dingler*, 118 Id., 259,

But is argued that the undue influence arises from the confidential relation existing between the testator and the legatee, and from the unlawful relation between the testator, a slave to drink, and the legatee, the person who unlawfully furnished the drink. It is contended that the evidence establishes the existence of these relations, and that they constitute a circumstance of proof which must be submitted to a jury. How is this confidential relation shown? It appears that Judson was in the habit of accompanying Levis in his visits to Philadelphia to collect interest; that at times Levis handed the interest to Judson, who then furnished money to the testator when he desired to pay outside bills. There is no evidence that the testator consulted Judson in any business matter, or that he asked or received Judson's advice. The testator's investments,

Hawkins' Appeal.

purchases and gifts were made without any suggestion from Judson. Mr. Morrison made the investment that is spoken of in the evidence; he also prepared the papers in the gift to the Friends' school. Mr. Morrison was also the custodian of \$4000 which were paid out from time to time to the testator personally or upon his order. It is even doubtful whether any of the Philadelphia income was handed to Judson prior to the time the will was made. We must remember that the elder Clayton, who died in November, 1887, had the Levis papers; and this income was not sufficient to pay the debts contracted at the hotel, for the evidence shows that due bills were held by the elder Clayton at the time the will was executed, and these were subsequently paid by Mr. Morrison out of the testator's share in the estate of his brother Paul. If Judson afterwards became the custodian of any of testator's funds, this fact could not have operated on the testator's mind when the will was drawn, for then the fact had no existence, and can not be used as a factor to show a confidential relation at the time the will was executed. * * * The attendance of Judson upon Levis in the Philadelphia visits indicates, as disclosed by the evidence, no more than a desire upon the part of the testator to protect himself against his own known weakness.

The evidence of an existing confidential relation is certainly insufficient to establish such relation. But suppose the evidence does establish it; that same evidence also discloses that the will was the free and intelligent act of the testator. The will was not drawn by the legatee or by his direction or procurement. The testator made application to the scrivener some months before to have a will drawn. He was taken to Mr. Hunter at his own request, and gave minute directions from which the draft was made. He discussed with the scrivener matters pertaining to his property, and when the will was written it was read over to him in detail. The legacy to Judson was a specific sum, not the residue or any part of it. There is no evidence upon which to base an argument that the testator did not fully comprehend the extent and character of the bequest he was making. The legatee was present, but took no part in the preparation of the will except to answer a question put to him by the testator. In this reply he said whatever the testator did was satisfactory to him. Levis was nursed by Judson, and seemed to recognize that he was indebted for the kindness shown him. He frequently declared that he would or had remembered the legatee in his will. His niece was

Hawkins' Appeal.

his only near relative, and it is evident that he did not take very kindly to her husband, for he never visited her at her home, although he showed the kindest interest in her before her marriage. She had some means of her own, a fact upon which the testator commented. Even where the will is drawn by a confidential adviser who is made the principal legatee, such will is not to be overthrown where it is clear that the person executing it was of sound mind and understood its contents and was not unduly influenced: *Yardley vs. Cuthbertson*, 108 Penna. St. R., 415.

The acts of confidential agency relied upon may all be classed under the head of kindness; but general kindness, unless it be shown to be part of a crafty arrangement to procure a testamentary disposition, is no evidence of undue influence: *Tawney vs. Long*, 76 Penna. St. R., 115; *Trost vs. Dingler*, 118 Id., 259.

The existence of a fiduciary relationship does not annul the testamentary act in favor of the attorney, even where he draws the will; but such fact calls for watchfulness, lest improper influence may have been exercised; and when in such case there is no evidence or fact indicating undue influence, the court should refuse an issue: *Harrison's Appeal*, 100 Penna. St. R., 458. If the testator and legatee stood in a confidential relation, we find nothing in the evidence to show that Judson Clayton abused the relation by any act, direct or indirect, showing undue influence.

Lastly, was there an unlawful relation which operated upon the mind of the testator in favor of the legatee? We were much impressed with the forcible argument made by the counsel for the contestant upon this question. That Judson Clayton violated the law daily in selling liquor to a man of known intemperate habits can not be denied. The sales were made willfully, and were therefore violations of the law even prior to the act of 13th May, 1887.

The natural and ordinary influence of an unlawful relation must be unlawful so far as it affects testamentary disposition favorable to the unlawful relation and unfavorable to the lawful heirs: *Dean vs. Negley*, 41 Penna. St. R., 318. Proof of an unlawful relation is therefore insufficient unless such relation affects testamentary disposition.

Does the unlawful sale of liquor to an intemperate man constitute an unlawful relation between the seller and the purchaser affecting testamentary disposition? If this is an unlawful relation in the contemplation of law affecting testamentary disposition, it can only

Hawkins' Appeal.

arise where the testator is, to a certain degree at least, dependent upon the legatee for his drink. From such a dependency the legatee may have acquired an undue influence over the testator. And yet such fact seems to us to establish no more than the existence of a favorable condition for the exercise of undue influence, similar to that condition which exists where there is mental weakness from age, infirmity or other cause; and in such case an issue is not awarded without some evidence that the will is not the free and independent act of the testator, and, as we already attempted to show, there is no such evidence in this case. There is no evidence that the legatee took advantage of this condition to unduly influence the testator in his behalf.

But we think the evidence fails to establish this dependency on the legatee for drink. The elder Clayton was the proprietor of the hotel when the will was made. The legatee was the bar-tender. The proprietor was at least equally responsible for the illegal sales. The testator was not dependent upon the legatee alone for his drink. It may be said the unlawful relation between the elder Clayton and the testator may defeat a legacy to the son, under the ruling in *Dean vs. Negley, supra*. But the answer to all is that the testator was not dependent upon this hotel for his liquor. This is shown by the fact that for a time he went to Philadelphia, and there indulged so freely that he had to be removed. Upon such removal he was taken with delirium tremens as the result of these excessive indulgences. The change to Clayton's seems to have acted as a check. He had the full control of his estate, could go when he pleased or remain. If refused liquor, he could go elsewhere to procure it. A man without means seems to be able to secure enough liquor to lead a drunkard's life, and a man with a large estate in his full control is sure to have no difficulty in obtaining all the liquor he can drink. If he can not walk to bring it, money will bring him both messengers and stimulants. This may be a sad commentary upon the observance of the liquor laws, but our observation tells us it is true.

We conclude that the evidence does not justify the awarding of an issue to the Common Pleas.

The appeal is dismissed and the issue is refused.

Childs & Evans, Esqs., for petition.

Larzelere & Gibson, Esqs., contra.

Court of Common Pleas of Montgomery County.

BOROUGH OF NORRISTOWN VS. NORRISTOWN PASSENGER RAILWAY CO.

A borough ordinance granted to a street railway company the right to use the streets on condition that "the company should reconstruct the said streets with the same kind of material used by the borough on the remaining portion of the streets." After completing its road the company reconstructed the street, which was then macadamized, with the same material used on the remaining portion. Subsequently the borough paved the street with Belgian blocks and sought to charge the company with part of the expense. *Held*, that the company was not liable, having once reconstructed the street, which was all the ordinance could require.

A general submission to viewers not named and to be appointed in the future, no matter of dispute having yet arisen, is revocable and not binding on either party.

MOTION for judgment and new trial. 31, March T., 1890.

Walter S. Jennings and Charles Hunsicker, Esqs., for plaintiff.

Joseph Fornance and Henry Freedley, Esqs., for defendant.

Opinion of the court by WEAND, J., October 6, 1890.

This action was brought to recover certain charges incurred by plaintiff in paving a street in Norristown, and for which it is claimed the defendant is liable. After the testimony necessary to an understanding of the case had been introduced, it was found that the case resolved itself into a mere question of law, and the court thereupon directed judgment to be entered for plaintiff, reserving the question of plaintiff's right to recover.

In the ordinance by which defendant was allowed to occupy the street occurs this provision:

"That said railway company shall reconstruct the said streets upon which said railway tracks are laid with the same kind of material used by the said borough authorities in the remaining portion of said streets between said tracks and at least one foot additional on the outside of each of the rails of said company, and keep the same in good order and repair throughout the entire length thereof." * * And provided, etc., "That in the event of said railway company using any street not macadamized by said borough, that in that event the said railway company shall use the material furnished by the said borough authorities in constructing the same, between the tracks of said company, and for at least one foot outside of each and every rail of said company, and thereafter keep the same in good order and repair throughout the entire length thereof; but

Borough of Norristown vs. Passenger Railway Co.

nothing herein contained shall be construed to compel the borough authorities to macadamize or grade any street or furnish any material to said company to macadamize any street between the tracks of said company, until said borough directs all of the said street to be macadamized."

This ordinance was accepted by the defendant, and thereafter became the contract between the parties. At the time of its passage and acceptance the intersection of Main and DeKalb streets was macadamized with crushed cinder and lime-stone. The defendant company after completing its road reconstructed the street with the same material then used by the borough. Subsequently the borough authorities determined to pave the intersection of said streets with Belgian blocks; and after notice to defendant, and upon their neglect to do so, the borough performed the work and now seeks to recover from defendant a share of the cost. On the part of defendant it is contended that the ordinance only requires them to reconstruct or rebuild the street once, and in the manner it was when the railway was built, and thereafter keep it in repair. On the other hand the contention of the borough is that this duty devolves upon the defendant as often as the borough may see fit to change the character of the street. The ordinance is loosely and inartificially drawn, and some parts of it can scarcely be explained; but it is our only guide to ascertain the rights of the parties to it.

The first duty of the defendant was to reconstruct the streets used by them. To "reconstruct" means to construct again—to rebuild. Does this mean once or as many times as the borough may see fit to change the character of the street? If I agree to reconstruct a house burned down, is not my obligation fulfilled when I once restore it to its original condition? In construing an ordinance or agreement of this kind words are to be used in their usual and ordinary acceptation and as consistent as possible with the understanding of the parties at the time. It was manifest that in building their road the defendants would be compelled to tear up the street. The borough is charged with the duty of keeping the streets in good order and condition. For the privilege thus granted of occupying the street the borough required that it should be under no expense to restore it or thereafter to keep that part between the tracks in repair. It therefore stipulated that the defendant should reconstruct said streets with the same kind of material used in the remaining

Borough of Norristown vs. Passenger Railway Co.

portion of said streets, and keep the same in good order and repair throughout the entire length thereof. The plain reading of the ordinance requires this and nothing more, and in the absence of anything to show a contrary intent it speaks for itself. It must be remembered that this is the borough's own requirement to which the defendant was asked to submit, and it had the right to infer that it meant what it plainly said and nothing more. The obligation of the defendant is to be found in its acceptance of the grant. The act of Assembly incorporating these companies is silent as to their duty in respect to the matter here in dispute, except that permission must first be obtained from the local authorities, who can prescribe reasonable conditions; and that is what was attempted in this case. The argument that the liability of the defendant follows from its act of occupying the street can not prevail in face of the fact that the extent of the liability is defined by the borough. The mere privilege, unaccompanied with conditions, would not of itself impose any burden such as is here claimed. A railway company would have as much right to use the street with its cars if they could be used with ordinary wheels, and there would be no difference between a street car and a cab or omnibus, as other persons do; but as they require tracks, which necessarily occupy the street and to some extent change its character, permission is required to do that which otherwise would be a nuisance.

If it is claimed that this will put the borough to great expense if it shall hereafter desire to change the character of our streets traversed by these companies, it may be answered that they had the power of protection in their own hands, and that in the absence of express liability the companies ought not to be subjected to great expense merely because the borough authorities may desire to experiment with different kinds of paving. Even if we are in error on this point, the second proviso above cited clearly prevents a recovery in this case. Assuming that the defendant would be liable to reconstruct the second time with Belgian blocks, that would be the case of a street "not macadamized," in which event the borough is to furnish the materials; and until this was done the defendant would not be liable. We are unable at present to give any intelligent construction to the words "nothing herein contained shall be construed to compel the borough authorities * * * to furnish any material to said company to macadamize any street between the tracks

Borough of Norristown vs. Passenger Railway Co.

of said company, until said borough directs all of the said street to be macadamized," it having already been provided that such furnishing was only to be done in streets *not* macadamized. We think, therefore, judgment must be given for defendant.

It is also claimed on the argument for judgment *non obstante veredicto*, although the point was not made at the trial, that Section 4 of the ordinance will prevent a recovery in this suit. It provides that "if at any time the town council of said borough shall be of opinion that the same [streets] is not in that proper order and repair required for the transportation of persons or property along the same," notice shall be given to the company of that fact, and that viewers will be chosen. The borough shall then choose one, the railway company shall choose another, and the two thus chosen shall select a third. If the railway company neglects or refuses to comply with the provisions of the section, then the borough shall select the viewers, whose duty it shall be to "report whether the said street or streets are in the proper condition for the transportation of persons or property along the same." If the viewers shall find that said streets are not in said condition, then notice is to be given to the company, and on their neglect to repair, etc., the borough shall do the work and charge the company with the expense.

We think this position is not tenable for two reasons. First, because this was not a case contemplated by said section. It was not pretended on the trial that the streets were not in the proper condition for the transportation of persons or property. The sole contention was as to whether the borough had the right to change the character of the paving and charge defendant with the cost, they having neglected to put down Belgian blocks after notice to do so. And secondly, as a general submission to viewers not named and to be appointed in the future, no matter of dispute having yet arisen, it was revocable and not binding on either party. The jurisdiction of the court could not thus be created: *Mentz vs. Armenia Fire Ins. Co.*, 79 Penna. St. R., 478; *Gray vs. Wilson*, 4 W., 41; *Snodgrass vs. Gavit*, 4 C., 224; *Lauman vs. Young*, 7 C., 310; *Rea's Appeal*, 13 W. N. C., 546. The defendant here denies any liability under the law, and hence a submission to viewers would be idle, as they were only to pass upon the question of the condition of the street.

And now, October 6, 1890, the motion for a new trial is overruled and judgment is now entered in favor of defendant *non obstante veredicto* on the reserved point.

BOROUGH OF NORRISTOWN VS. CITIZENS PASSENGER RAILWAY CO.

A borough ordinance granted to a street railway company the right to use the streets on condition that "the company should reconstruct the said streets with the same kind of material used by the borough on the remaining portion of the streets." After completing its road the company reconstructed the street, which was then macadamized, with the same material used on the remaining portion. Subsequently the borough paved the street with Belgian blocks and sought to charge the company with part of the expense. *Held*, that the company was not liable, having once reconstructed the street, which was all the ordinance could require.

A general submission to viewers not named and to be appointed in the future, no matter of dispute having yet arisen, is revocable and not binding on either party.

MOTION for judgment *non obstante veredicto*. 33, March T., 1890.

Walter S. Jennings and Charles Hunsicker, Esqs., for plaintiff.

Joseph Fornance and Henry Freedley, Esqs., for defendant.

Opinion of the court by WEAND, J., October 6, 1890.

The opinion just filed in No. 31, March T., 1890, governs this case, and judgment must be entered in favor of the defendant.

In addition to the defendant's denial of any liability to reconstruct with Belgian blocks, it was also claimed on the argument (although this point was not raised at the trial) that by Section 4 of the ordinance, under which this road was built, it was provided that if at any time the town council should be of opinion that the "streets were not in that proper order and repair required for the transportation of persons or property along the same," notice should be given to defendant; and in default of repair by the company, the borough should do so and file a claim in the Prothonotary's office for the amount, and collection of the same may be made in the same manner and by the same process as is prescribed in the twenty-ninth section of the act of Assembly of Pennsylvania approved June 16, 1836, entitled "An act authorizing the Governor to incorporate the Huntingdon and Chambersburg Railroad Company," and the several supplements thereto.

By the Constitution of this commonwealth the Legislature is prohibited from passing any local or special law "regulating the affairs of counties, boroughs," etc., or providing or changing methods for the collection of debts or the enforcing of judgments; and "no

In re Turnpike Co.

law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only." And yet all these things have been attempted by this borough ordinance.

It is clear that the borough council could not do what the Legislature is forbidden to do, and the agreement of the defendant does not mend the matter; otherwise each party to a suit might establish a different course of procedure and provide their own method for the collection of claims.

And now, October 6, 1890, judgment is entered in favor of the defendant *non obstante veredicto* on the point reserved, and the motion for a new trial is overruled.

Court of Quarter Sessions of Montgomery County.

IN RE NORRISTOWN, BRIDGEPORT AND KING-OF-PRUSSIA TURNPIKE
ROAD COMPANY.

The notice required by the act of June 2, 1887 (condemnation of turnpikes), is to be made upon the county commissioners or proper municipal authorities, who will be obliged to pay the damages.

Where a turnpike is in other respects sufficiently described, the omission in the notice of a word, part of its corporate title, will not invalidate the proceedings.

A toll-house standing on the road condemned is a part of the road, and is properly included in the condemnation.

EXCEPTIONS to report of viewers.

H. B. Dickinssn, Esq., for petitioners.

Holland & Dettra, Esqs., for exceptants.

Opinion of the court by WEAND, J., September 15, 1890.

No depositions have been taken to sustain either exception, and some of them were not even argued; but it was stated by counsel who filed them that they would all be insisted upon. Unnecessary

In re Turnpike Co.

work is thus cast upon the court, whose labors could be relieved if counsel would either frankly state the points seriously pressed or show to the court in what the alleged errors consist.

The first exception is not sustained. In the absence of evidence to the contrary we must assume that the petitioners are what they represent themselves to be—*i. e.*, resident tax-payers.

The second exception alleges that notice in writing, etc., was not served upon the municipal authorities of either Bridgeport borough or the township of Upper Merion. The report states that legal notice was served upon these parties, and neither of them made any objection to the proceedings. It is questionable whether such notice was required. The act of June 2, 1887, provides that written notice of the meeting shall be served upon the county commissioners or proper municipal authorities. This notice was evidently intended for the party who would be obliged to pay the damages, which in this case was the county. In other cases it might be the city or other municipal authorities.

The third exception requires proof, and in the absence of any is not sustained.

In the fourth exception complaint is made that the toll-house is included in the condemnation. In their report the jury say "which sum includes the frame toll-house standing on said turnpike road condemned, or such portion thereof as does stand thereon, but does not include the dwelling-house and lot of ground not included in the road-bed which are not necessary for public use," etc. We fail to see any error in this, or how the turnpike could be taken without also taking that which stood thereon and therefore part of it. If not taken it would have to be paid for as an element of damage. This finding is sustained in *Montgomery Co. vs. Bridge Co.*, 110 Penna. St. R., 54.

The fifth and sixth refer to the points of beginning and ending. Both are definitely fixed in the petition and report. The whole road is condemned, and this would render great particularity in this respect unnecessary.

The seventh exception alleges that the notice of intended application for a jury does not state what turnpike is to be viewed and condemned, nor the names of the owners. In the published notice the turnpike is described as the Norristown and King-of-Prussia Turnpike Company, lying and being in the borough of Bridgeport

and township of Upper Merion. Beginning, etc., and ending, etc. We assume that the omission of the word Bridgeport from the corporate title is the error referred to. This could do no harm; for the road was in other respects described, and no person with ordinary common sense could be misled.

The eighth exception alleges that the jury have condemned and awarded damages to "The Norristown, Bridgeport and King-of-Prussia Turnpike Company," whereas "The President and Managers of the Norristown and King-of-Prussia Turnpike Road Company" were the owners of the road condemned. No evidence has been produced to sustain this allegation, and no such corporation is here claiming damages. There is no foundation for this exception except the fact that the petition refers to a wrong act of Assembly under which the company which constructed and owns the road was chartered. It was not necessary to state this in the petition, and it may be treated as surplusage. The acceptance by the company of the award will be an admission that their road is taken; and it does not appear that there is any other company owning a road within the limits described.

The remaining errors are to the charge of the master to the jury. It was his duty "to instruct the viewers upon matters of law," and we fail to see any error in the language used.

And now, September 15, 1890, the exceptions are dismissed and the report is confirmed.

Court of Common Pleas of Montgomery County.

CHARLES S. ANDERS ET AL. VS. AMBROSE K. GERHARD.

Construction of will.

A, by will, directed that after payment of his debts, etc., \$300 should be set apart for his wife M, and of "the remaining sum I give and devise one-half thereof to my wife M, to hold the same absolute." The other half he gave to his brother and sisters and their heirs.

In another clause he ordered his executors to sell all his real and personal property and convey the same in fee, "subject to my said wife's moiety." "The money arising from my real estate I give to my said brother and sisters aforesaid, to be equally divided; the other moiety or half part thereof I give to the heirs of my said wife, to be divided amongst them after her decease." The will also provided that after his wife's death his home was to be sold, and the proceeds divided one-half to his brother and sisters and their heirs, "the other half part to the heirs of my said wife, so that at the final settlement of my estate my heirs and the heirs of my wife shall each receive one-half of my estate, real and personal." *Held*, that the wife took a fee.

CASE stated.

Samuel Y. Kriebel died seized of certain real estate, leaving a last will and testament, wherein it is provided as follows:

First. I order that all my just debts and funeral expenses be fully paid and satisfied, after payment thereof, and the sum of three hundred dollars being set apart for my beloved wife as the law directs. The remaining sum I give and devise, as follows, to wit: One-half thereof I give and devise to my beloved wife, Mary, to hold the same absolute; the other half part thereof I give and bequeath unto Charles Kriebel, Mary, late wife of Daniel Schultz, deceased, the heirs of Susanna Gerhart, deceased, and Sarah Y. Anson, wife of Samuel Anson, who being my brothers and sisters, and to their heirs, to be equally divided amongst them.

Item 2. I give and devise my homestead in the borough of Norristown to my said wife during her natural life; and if she should desire to sell the same, I order my executors to sell the same at public sale, and convey the same to the purchaser in fee. The proceeds arising therefrom I order my executors to invest for her use and benefit during her life-time.

Item 3. I order my executors hereinafter named to sell all my real and personal property at public or private sale, and convey the

same to the purchaser in fee, subject to my said wife's moiety. The money arising from my real estate I give to my said brother and sisters, aforesaid, to be equally divided; the other moiety or half part thereof I give to the heirs of my said wife to be divided amongst them after her decease.

Item 4. After the decease of my said wife I order my executors to sell the home, and as aforesaid, if not previously sold, and the money arising therefrom I give and bequeath in the following manner: One-half thereof I give and bequeath to my brother and sisters and to their heirs. The other one-half part thereof I give and bequeath to the heirs of my said wife, so that at the final settlement of my estate, my heirs and the heirs of my wife shall each receive one-half of my estate, real and personal.

Lastly, I nominate, constitute and appoint Charles A. Anders, of Worcester township, and Hiram A. Kriebel, of Whitpain township, executors of this my last will and testament, giving them or the survivor of them full power to execute the same.

The executors and widow contracted to sell the real estate and tendered a deed in fee simple for the premises, which defendant refused to accept on the ground that plaintiffs could not convey a good title to a moiety thereof, freed and discharged from the interest therein of the said Mary Kriebel and her heirs after her decease.

Childs & Evans, Esqs., for plaintiff.

Charles Hunsicher, Esq., for defendant.

Opinion of the court by WEAND, J., October 6, 1890.

It is plain reading that the testator intended to divide his estate between his own and his wife's heirs, and that final settlement should not be made until after the death of his wife. It is equally plain that by "heirs of my said wife" he meant heirs generally, and not children or any particular heirs. In the first item he describes his own heirs to be his brothers and sisters and their children; and when he refers to his wife's heirs, he undoubtedly meant any who might stand in the same relationship to her. This being so, they take through her as *qua* heirs by descent, and not as purchasers. Having thus discovered the intention of the testator as to how they were to inherit, the rules of law must apply even if the general intention of the testator be defeated. .

Anders et al. vs. Gerhard.

He undoubtedly intended to benefit the heirs of his wife by providing for them after her death; and this he meant to do by limiting the estate given to her, for her life, and then to her heirs. In the first item, however, he gives his wife one-half of his estate absolutely. This refers to both real and personal, for in the third item he directs his executors to sell all his real and personal property subject to his said wife's moiety, meaning the share given to her in the first item. After thus providing for a sale he attempts to provide for his wife's heirs after her decease, and thus cut down the estate previously given to her. He does not, however, provide for a failure of heirs nor for the disposition of the income of his "wife's moiety" during her life. Unless, therefore, she has an absolute estate by the first item, or a life estate by implication under the third item, he would die intestate as to the one-half of the real estate during her life. Jarmon on Wills, Vol. II, page 532, lays down the rule that "it has become a settled distinction that a devise to the testator's heirs after the death of A will confer on A an estate for life by implication; but that under a devise to B, a stranger, after the death of A no estate will arise to A by implication."

It is unreasonable, however, to suppose that after having first given his wife an absolute estate, he should then cut her off entirely from any interest therein. A more reasonable construction, and one more consistent with the testator's intention, would be that he intended a life estate for his wife with remainder to her heirs. But we would then have a freehold in the wife with remainder to her heirs, which would vest as an executed estate of inheritance in the ancestor. That this may defeat the intention of the testator can make no difference. "If the intention of the testator be that the remaindermen should take as the heirs of the grantee or devisee of the particular freehold, instead of themselves becoming the root of a new succession, the rule is applied, although it may defeat a manifest intention that the first taker should have but an estate for life": Guthrie's Appeal, 37 Penna. St. R., 9; Doebler's Appeal, 64 Id., 9.

If we attempt now to put the testator's language into such shape as to give effect to both the first and third items and make them consistent, and at the same time properly express his meaning, it would read thus: "One-half thereof I give and devise to my beloved wife Mary to hold the same absolute," "and after her decease I give her said share to the heirs of my said wife," etc. This would be a de-

West vs. Connell, Ex'trix.

visé to Mary and the whole body of her heirs, without limitation or restriction, absolutely and generally; and there being no devise over in default of heirs, would vest the fee in her.

In *Steiner vs. Kolb*, 57 Penna. St. R., 123, the devise was "to Elizabeth for her life-time; but immediately after her decease it shall belong to her legal heirs, share and share alike," and it was held to pass a fee.

We are therefore of opinion that the title proposed to be conveyed will be good and indefeasible, and that judgment should be entered for the plaintiffs.

And now, October 6, 1890, judgment is entered in favor of the plaintiffs and against the defendant for the sum of six thousand eight hundred dollars (\$6,800), with costs of suit.

SAMUEL WEST VS. CATHARINE CONNELL, EXECUTRIX.

That a lease is for a longer term than three years does not prevent a rescision thereof by agreement of the parties not in writing when accompanied by a surrender and an acceptance by the landlord.

MOTION and reasons for a new trial.

March & Brownback, Esqs., for plaintiff.

Wanger & Knipe, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., September 15, 1890.

The lease in this case was in writing, and was to continue for the term of five years. We charged the jury that there could be a rescision of the contract without the formality of a written instrument. This was not error. In *Auer vs. Penn*, 92 Penna. St. R., 444, the court said: "The fact that a lease is for a longer term than three years does not prevent a rescision thereof by agreement of the parties when accompanied by a surrender of the term and possession by the tenant to the landlord, and the acceptance thereof by the latter." If the jury believed the defendant, then such an agreement and surrender were proved. The key was delivered to the person appointed or designated by the landlord to receive the same.

Blake's Estate.

The declarations of the wife made in the presence of the husband were received in evidence. She collected the rent, attended to the repairs, and made the bargain for a reduction.

We still think that an examination of the evidence shows that the witness O'Brien corroborated the defendant. We left it to the jury, however, to determine this matter, for we stated that there was such corroboration as we recollected the testimony.

Our comments upon the action of Missimer as to the posting of a notice upon the premises were as favorable to the plaintiff as the evidence justified. That Missimer came to post such notice even while the tenant was still in possession, was not denied.

The issue raised was one of fact, and we are not prepared to say that the jury failed to render a true verdict.

And now, September 15, 1890, the reasons for a new trial are dismissed and the motion is overruled.

Orphans' Court of Montgomery County.

ESTATE OF JOHN BLAKE, DEC'D.

Where land is sold by an order of court under the act of April 18, 1853, the court ordering such sale must appoint a trustee when necessary to hold the proceeds of sale not presently distributable, so that the payment of legacies charged upon the land so sold may be enforced when the time for distribution arrives. The courts of the county where the will of the testator was probated can not appoint such trustee when the land devised and sold as aforesaid is situate in another county.

EXCEPTIONS to supplemental report of auditor.

Geo. W. Rogers and Childs & Evans, Esqs., for exceptions.

Larzelere & Gibson, Esqs., for exceptants.

Opinion of the court by SWARTZ, P. J., November 3, 1890.

John Blake died in the city of Philadelphia, and his will was probated in said city. By his will he gave his wife "three hundred

Blake's Estate.

dollars yearly, each year during her natural life, the same to be paid to her by my sons Thomas M. Blake and John Blake out of the real estate devised to my said sons as hereinafter mentioned." Similar bequests were made to his daughters Catharine Blake and Susanna Blake, "the same to be paid to them out of my said real estate by my sons Thomas M. Blake and John Blake." The testator also provided for the payment of certain legacies to his daughters upon the death of his widow, and these, too, were to be paid by said sons out of the real estate devised to them. He devised his farm in Philadelphia county to his son Thomas and the farm in Montgomery county to his son John, and provided, "my said sons Thomas M. Blake and John Blake are to pay all my debts and the aforesaid legacies and annuities out of the said farms devised to them, and I want each son to pay in proportion to the amount of the valuation which I have placed on each farm."

The farms were accepted by the sons, and the Montgomery county farm, devised to John Blake, was sold by the Orphans' Court of said county by proceedings under the Price act. The proceeds of this sale are now for distribution. The question arises, Into whose hands shall be placed the fund from which the annual payments to the widow and daughters are to be made? The auditor directs the fund to remain in the hands of John Blake, trustee under the will of his father. John Blake was appointed trustee by the Orphans' Court of this county to sell the farm devised to him, and the proceeds now for distribution are in his hands.

If the auditor is in error in this distribution, we are responsible for such error. In an application to this court for the appointment of a trustee to take charge of the fund set apart for the widow and daughters, we decided there was no necessity for such appointment; and we held, further, that if any trustee was to be appointed the Orphans' Court of Philadelphia must make such appointment. On further examination and reflection we find that we were in error. It is true the legacies are to be paid by John Blake. But this burden is cast upon him by his acceptance of the farm; he is to pay as devisee and owner, not as executor or trustee. The legacies are charged upon the land, and in such cases the executor has nothing to do with the legacies. Even in an application to enforce payment the executor must not be made a party: *Field's Appeal*, 36 Penna. St. R., 11.

Blake's Estate.

John Blake as the devisee can not be treated as a trustee under the will, in relation to these legacies. He was appointed as trustee to sell, but he can not hold the fund in that capacity. He gave security for the faithful application of the purchase money. The act of April 18, 1853, provides that the purchase money arising from sales of lands by the courts of the county where the property is situate shall be decreed "to the discharge of liens and to parties interested as and when they may be entitled." This is to be done by the court ordering the sale. The trustee appointed in this case sold the farm, filed his account, brings the money into court to be by us decreed to the parties entitled thereto. After such payment his trust under the appointment to sell ends. He was not appointed a trustee to hold the proceeds of sale butto sell and bring the proceeds into court.

A new trustee must therefore be raised to hold this fund. As this court ordered the sale and divested the legacies, it is the duty of this court to protect the fund. By the sale the proceeds of the farm are to stand for the farm. If John Blake still owned the farm process would issue from this court to enforce payment of the legacies, although the Philadelphia court would enter a decree for such payment: Section 60, Act of February 24, 1834, P. L., 84.

As the land could not be sold without our authority, it follows that the proceeds which take the place of the land ought to remain in our control so that we may enforce payment to the legatee when entitled to the fund or its income. This view is strengthened when we consider the Act of 1 May, 1861, P. L., 420, which provides that the devisee of land charged with the payment of legacy may pay into the Orphans' Court of the county wherein the land is situated the full amount of such legacy. And the court so receiving the money is to make the distribution in the manner provided for the distribution of the proceeds of Sheriff's sales.

We therefore conclude that the Orphans' Court of Montgomery county must appoint a trustee or trustees to take charge of the funds aforesaid. As John Blake assumed a personal liability to pay his proportion of these legacies when he accepted the farm under the conditions imposed, he should be consulted in the selection of the trustee; and if he enters proper security and is willing to accept the trust, we see no reason why he should not be appointed.

Landis vs. Longenecker.

And now, November 3, 1890, the exception to the distribution is sustained so far as it relates to decreeing any part of the funds to John Blake, Jr., trustee, and the report and distribution are corrected so as to read, as follows:

To the trustee to be appointed by this court for Kitty Ann Blake fund, \$1,374.64.

To the trustee to be appointed by this court for Catharine Blake fund, \$412.40.

To the trustee to be appointed by this court for Susanna Blake fund, \$412.40.

Court of Common Pleas of Lancaster County.

LANDIS VS. LONGENECKER.

The Sheriff put up sale bills describing the two tracts of land to be sold as containing forty and twenty acres, whereas they really contained less than four and less than two acres respectively. Twelve days before the sale corrected bills were put up in nearly if not quite all of the places where the first bills had been, and corrected advertisements appeared once in each of two weekly newspapers. The two tracts were worth \$7500 to \$8500, and against them were over \$8000 in judgment liens. They were sold for \$6. *Held*, that the sale should be set aside.

RULE to set aside Sheriff's sales.

Brown and Hensel, Esqs., for rule.

Walter M. Franklin, Esq., contra.

Opinion of the court by PATTERSON, J., October 16, 1890.

The above rule was taken, and on the argument depositions were read showing that the Sheriff's advertisements of sales under his writ were misdescriptive. The exceptions are:

1st. Property No. 1 is improperly advertised in the Sheriff's advertisement as containing *forty* acres of land, whereas it should be *three* acres and some perches.

2d. Property No. 2 is improperly advertised in the Sheriff's advertisements as containing *twenty* acres of land, whereas it should be *two* acres.

Bishop et al. vs. Cowden et al.

3d. The price bid for the said properties, to wit, No. 1 one dollar and No. 2 five dollars, is grossly inadequate.

The depositions read and the said Sheriff's advertisements exhibited, show the errors alleged as to the quantity of land in the several tracts sold. That is sufficient to set aside the sale, it seems. The errors in the Sheriff's advertisements, when discovered, were attempted to be corrected. The Deputy Sheriff, however, testified that he put up the corrected bills of sale twelve days before the sale of the properties. He further testified that he could not say that he put the corrected bills at every place where he put up the first bills. But was the act of Assembly fully complied with in regard to notice? We think not, and the result or issue of the sale made of the several properties strongly supports that conclusion. The property designated No. 1, worth six or seven thousand dollars, sold at this sale, brought one dollar, and No. 2, worth fifteen hundred dollars, sold at this sale for five dollars. The prices bid were clearly grossly inadequate. The rule, we think, looking at all the facts developed, ought to be sustained.

We set aside the sale. Rule absolute.

Court of Common Pleas of Montgomery County.

IN EQUITY.

BISHOP ET AL. VS. COWDEN ET AL.

On failure of plaintiff in a bill in equity to file a replication after being ruled to do so, the defendant is justified in setting the case down for hearing on bill and answer; and a replication subsequently filed without leave of court will be stricken off on motion where the record shows no excuse or justification for the delay.

MOTION to dismiss bill upon bill and answer. No. 4, October T., 1888.

Henry Freedley, Esq., for plaintiffs.

Mrrzelere & Gibson, Esqs., for defendants.

Vol. VI.—49.

Bishop et al. vs. Cowden et al.

Opinion of the court by WEAND, J., September 15, 1890.

This case comes before us on a motion to dismiss the bill upon bill and answer. The answer was filed May 8, 1889, and on June 11, 1889, defendants entered a rule upon plaintiffs to reply within ten days *sec reg.* This rule was duly served. No replication having been entered, on February 15, 1890, defendants filed their motion to have the matter heard on the answer. On May 7, 1890, the plaintiffs, without obtaining leave of court, filed a replication. It is conceded that the answer denies every material allegation in the bill, and that if the replication is not to be allowed the court must dismiss the bill.

The equity rules provide that "on failure to file such replication with notice to the defendant's counsel, the plaintiff shall be deemed to have abandoned his right to traverse the matters alleged in the answer." The defendant, therefore, had the right to consider the right to reply as waived, and to set down the matter for hearing on bill and answer. If no replication be filed, the averments of the answer are to be taken as true: Russell's Appeal, 34 Penna. St. R., 258.

In Henning's Appeal, 67 Penna. St. R., 18, the court permitted a replication to be filed *nunc pro tunc*; but there the matter had been referred to a master without objection, and report made.

In Schooley vs. Shoemaker, 4 Kulp, 345, a replication was also allowed because of a misunderstanding as to the practice in regard to exceptions.

In Jones vs. Park, 1 W. N. C., 17, the court refused such action after notice that the case had been set down for hearing on bill and answer.

In this case the plaintiffs have been guilty of such laches as to require us to sustain defendants' right to proceed under the rules. The record shows no excuse or justification for the long delay, and the bill must be dismissed with costs.

The solicitor for defendants is directed to prepare a decree *sec reg.*

JAMES SUTHERLAND VS. WILLIAM ROSS.

Where a deed is duly acknowledged by the grantors the certificate of the magistrate dispenses with the common law evidence of execution, and notice that proof of execution would be required does not take away the effect of such certificate or change the burden of proof.

Where the grantee in a deed is dead and his right to the subject in controversy passed to the defendant party on the record, the grantor as the remaining party to the suit is not competent as a witness to show what took place in the life-time of the grantee when the purpose of such evidence is to show the forgery of the deed.

MOTION and reasons for a new trial.

J. M. Arundel, Esq., for plaintiff.

Childs & Evans and Geo. N. Corson, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., November 17, 1890.

The defendant claimed title by deed from plaintiff and wife to one Nicholas Dager, who was defendant's grantor. The plaintiff alleged that the deed to Dager is a forgery. Nicholas Dager died before this suit was brought. When the defendant offered the deed of Sutherland to Dager, the plaintiff objected because the execution of the deed was not proven. A short time before trial the defendant's counsel received notice that the execution of this deed must be shown.

The deed was duly acknowledged by the grantors, and the certificate of the magistrate dispensed with the common law evidence of execution: *Brotherton vs. Livingston*, 3 W. & S., 334. The acknowledgment of a deed is a judicial act, and the certificate of it in the absence of fraud is conclusive of the facts therein stated: *Cower vs. Manaway*, 115 Penna. St. R., 345; *Theeter vs. Glasgow*, 79 Id., 83. One of the facts set forth in such certificate is the acknowledgment by the grantors that the indenture is their act and deed. We know of no rule of law that allows a party by a simple notice to take away the effect of such a certificate or to change the burden of proof.

The plaintiff was offered as a witness to prove what took place at a certain meeting in Philadelphia in the life-time of Dager. According to the offer, the plaintiff intended to testify that the deed was not acknowledged at that time and place, but, on the contrary, was forged on said day by the agent of Dager. The witness was incompetent. The act of May 23, 1887, P. L. 160, excludes "any

Sutherland vs. Ross.

surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party." Dager was dead, and his right to the subject in controversy passed to the defendant; and the plaintiff, as the remaining party, is excluded as a witness: *Duffield vs. Hue*, 129 Penna. St. R., 94.

It is argued that inasmuch as Dager was not present at this meeting, he could not, if living, contradict the evidence of the plaintiff. But this is not the test of competency; and if it were, how can we say that Dager if living would not fully answer the defence set up by this proposed evidence? If Dager were living he might show acts and declarations of the plaintiff subsequent to this Philadelphia meeting, that would of themselves constitute a full answer to the plaintiff before a jury.

This was not an offer to show facts occurring since the death of Dager, or facts occurring after the death which inferentially tend to prove that the same facts existed prior to the death. If the plaintiff had been called for the sole purpose of denying his signature to the deed, he could have been excluded under *Faster vs. Collner*, 107 Penna. St. R., 305, and *Adams vs. Edwards*, 115 Id., 211; for such evidence would necessarily show that the forgery occurred in the life-time of Dager, for the alleged forged deed was recorded before Dager died. But as this was not the offer, it is needless to pass upon this question.

And now, November 17, 1890, the motion for a new trial is overruled and the reasons are dismissed.

REID VS. WEST CONSHOHOCKEN.

Viewers appointed under the act of 24th May, 1878, P. L. 129, to estimate damages for change of grade, are not entitled to mileage.

EXCEPTIONS to Prothonotary's taxation of costs. No. 125, October T., 1889.

James B. Holland, Esq., for plaintiff.

Larzelere & Gibson, Esqs., for defendants.

Opinion of the court by WEAND, J., September 8, 1890.

This was a proceeding under the act of 24th May, 1878, P. L. 129, to recover damages for a change of grade, and raises the question whether the viewers under said act are entitled to mileage in addition to their per diem allowance of one dollar and fifty cents per day.

The act makes no provision for mileage, and unless it is allowed by an act of the Legislature it can not be recovered. Under the act of 13th May, 1874, P. L. 138, fixing the pay of road commissioners, road and bridge viewers, reviewers, etc., mileage is expressly allowed in addition to the per diem pay. The Legislature had this act before them when they passed the act of 1878, and having omitted from the latter act the mileage clause we must assume that they did so intentionally. Even if allowed we have nothing by which to fix the amount, for we can not assume that they are entitled to the same pay as ordinary road viewers. This is a matter that deserves the attention of the next Legislature.

And now, September 8, 1890, exceptions dismissed and taxation sustained.

FURTH VS. FRETZ.

An affidavit of defence to part of a claim which does not state how much is due or how the defendant is injured by the alleged breach of contract, is bad.

In an affidavit of defence, A, the defendant, claimed that he had bought two horses from plaintiff, but that he had only received one of those bought and another old horse, without alleging that he had returned or offered to return the old horse, or that it was of less value than the one bought. *Held*, not to be sufficient.

SUR RULE for judgment.

Childs & Evans, Esqs., for plaintiff.

J. P. Hale Jenkins, Esq., for defendant.

Opinion of the court by WEAND, J., November 17, 1890.

The defendant's affidavit alleges that he has "a just and true defence to the whole" of plaintiff's claim; but after stating the facts constituting his defence he also says, "therefore the full amount due on said note is not due." He nowhere states how much is due, nor to what extent he is damaged. Having retained the horse sent him he can offset the difference in value between what he actually received and what he was entitled to receive; but this should be stated, so that plaintiff might take judgment for the amount admitted to be due if he elected so to do. Whilst the affidavit alleges that instead of the horse purchased, another horse—an old one—was delivered to him, he does not allege that the one received was not as valuable as the one bargained for. Conceding that he was not bound to receive an article not purchased, yet having received and retained it he can not defend against the price without alleging and proving damage. We think the affidavit is insufficient.

And now, November 17, 1890, rule for judgment is made absolute.

Court of Quarter Sessions of Montgomery County.

IN RE ORDER TO ASSESS DAMAGES TO HURST & ROBERTS BY REASON
OF THE OPENING OF HAMILTON STREET, IN THE BOROUGH OF
NORRISTOWN.

The grantee of a town lot described as abutting on the side of an unopened street will take title to the centre of the street when opened, and is entitled to the damages occasioned thereby.

In re Brooklyn St., 118 Penna. St. R., 646, and In re Wayne Avenue, 23 W. N. C., 232, are not in conflict with the decision in Lehigh St., 32 P. F. S., 85.

EXCEPTIONS to report of viewers.

Holland & Dettra, Esqs., for exceptions.

Isaac Chism, Esq., for exceptants.

Opinion of the court by WEAND, J., September 15, 1890.

Hamilton street was laid out by the report of commissioners appointed by act of 26th March, 1853. The width was fixed at sixty-six feet. On March 4, 1890, this court decreed the opening of said street; and subsequently Hurst & Roberts, who own land through which said street was opened, petitioned for a jury to assess damages. The report covers damages for one-half the bed of the street, from Main or Egypt to Jackson street. It is now objected on the part of the county that the claimants are not entitled to all these damages for the following reasons. Samuel DeHaven, being the owner of the whole land, conveyed the same to Enos H. Vaughan, who afterwards sold part thereof to one Jonathan Grisdale by deed dated October 7, 1873, and duly recorded. This deed describes the lots as extending to the southeast side of Hamilton street, and thence along the side of Hamilton street, etc. By deed dated October 7, 1873, duly recorded, Vaughan also sold part of the tract to George Platt, again describing the lots as bounding on Hamilton street and extending along the side thereof. George Platt subsequently conveyed to Grisdale. Claimants' title is derived through

In re Damages.

Vaughan by subsequent deed, and embraces the one-half of Hamilton street, being the side upon which Grisdale's land abuts. Under this state of facts it is claimed that Grisdale is entitled (if any one is) to the damages caused by the opening of the street in front of his property. These damages were assessed to Hurst & Roberts.

It has been repeatedly held that the grantee of a town lot abutting on a street opened for public use takes a fee to the centre, although the description adopts the side as a boundary: *Cox vs. Freedley*, 9 C., 127; *Paul vs. Carver*, 2 Casey; *Lehigh St.*, 32 P. F. S., 85. The latter case seems to rule the one now before us, the facts being almost identical. It was there ruled that "Under an act of Assembly a street was laid out in Easton over land of Rivek. He afterward sold lots of the land calling for the south side of the street as a boundary. Subsequently the street was opened. *Held*, that the grantees had title to the fee to the centre of the street, and were entitled to damages for the opening of the street." By a change of names we have the identical case now before us.

In re Brooklyn St., 118 Penna. St. R., 646, and In re Wayne Avenue, 23 W. N. C., 232, do not conflict with the case cited. In neither case did the same question arise, and in both the question ruled upon was one of dedication. If in this case the county had taken the position that by referring to Hamilton street as an existing street, the then owner (Vaughan) had thus dedicated it to public use, and thus lost his right to damages, the ruling in Brooklyn St. and Wayne Av. would apply, and, as a consequence, the owner at the time of opening would be entitled to damages; and, as we have seen, that owner was Jonathan Grisdale, the grantee of Enos Vaughan, whose deed called for the side of the street. As it is, therefore, clear that the jury awarded damages to Hurst & Roberts to which they were not entitled, and as we can not separate the damages, the exceptions must be sustained.

And now, September 15, 1890, the fourth exception is sustained and the report is set aside.

Court of Common Pleas of Montgomery County.

WILLIAM F. SOLLY, RECEIVER OF THE SCHUYLKILL VALLEY MUTUAL
FIRE INSURANCE COMPANY OF NORRISTOWN, VS. WILLIAM W.
POTTS.

A mutual insurance company issued policies upon three plans—all cash, perpetual, and premium note. Upon the insolvency of the company and the appointment of a receiver, the premium notes are subject to the assessment directed by the court: First, to pay fire losses; secondly, to pay the necessary expenses of the receivership; thirdly, to pay off money borrowed by the directors and used to pay losses occurring in the life of the policy for which the premium note issued; and fourthly, to raise a fund to return the deposit money received on perpetual insurance and used by the company in the payment of losses occurring in the life of the policy represented by the premium note.

SUIT to recover an assessment on a premium note in a Mutual
Fire Insurance Company. No. 67, June T., 1890.

Henry Freedley and J. A. Strassburger, Esqs., for plaintiff.

Larzelere & Gibson, Esqs., for defendant.

Opinion of the court by SWARTZ, P. J., December 12, 1890.

Gentlemen of the Jury—This is a suit brought by Mr. William F. Solly, Receiver of the Schuylkill Valley Mutual Fire Insurance Company of Norristown, against William W. Potts. The plaintiff seeks to recover an assessment on a premium note held by the company against the defendant, the allegation being that this premium note was subject to assessment for losses and expenses of the company, and that such losses and expenses have occurred and that the defendant is liable to pay the assessments. The assessment is for 45 per cent. on \$385, the face of the premium note.

This insurance company did business upon three plans. The first we may term the all cash plan. That is, a person who desired to be insured in this company paid an annual or periodic cash premium and was not liable for anything beyond that payment.

Solly, Receiver, &c., vs. Potts.

Then there was a second class, those who had perpetual policies.

Then, there was still a third class where a person instead of paying a large sum for insurance gave a note, called a premium note, and paid the annual interest of that note for his insurance, with this stipulation: That if there were losses in the company and the running income did not provide a fund to pay the losses, that then the company could call upon that premium note, make an assessment upon it and make the insured person pay his proportion towards the loss. That was the stipulation; that they might assess to the full extent of that note and no more. If the losses were so extensive and of such a serious character that all the premium notes outstanding, the whole aggregate of them would be required to pay losses, the company had a right to demand and receive the aggregate of those premium notes. You will bear in mind, however, that a person who was liable on a premium note could only be liable for losses occurring during the life of his policy. He could not be called upon to pay losses or assessments upon his premium note which occurred prior to the issuing of his policy or subsequent to the termination of his policy.

Now, you will note the difference in these three plans. While the man who gave the premium note may not have paid as much in the first instance, by reason of his paying a less sum (if that was the fact), he subjected himself to an additional risk. He obligated himself that he would not only pay the annual interest on that note but that if the demands of the company required it he would pay in the face of that note, or such proportions of it as might be required for the payment of losses. Now, it might be that a man who entered into this third method of insurance made a bad bargain. It may be that it was a hardship for him to pay losses that may have occurred under the cash plan or under the perpetual insurance plan, yet he made his contract and this is a mutual company, and he must stand by his bargain, be it a hard bargain or an easy one. It may be that those who entered this kind of insurance, or accepted this kind of insurance, found to their sorrow that it was a bad bargain, yet that would not justify the jury in relieving them from their bargain. If a member of this company had his property destroyed and sustained loss he ought to be paid, and if the stipulation was that these premium notes were to be answerable for

Solly, Receiver, &c., vs. Potts.

that loss he has a right to demand payment for his fire loss, and the parties who are indebted on these premium notes cannot complain if they are called upon to make a payment. These premium notes, to a certain extent, constituted the capital of the company.

The first inquiry will be what are the losses that the defendant in this case is liable for. His policy was issued upon the 9th day of March, 1884, to continue for one year. That is, it expired by limitation on the 9th day of March, 1885. The note was for \$385 and the assessment made upon that note was at the rate of 45 per cent. It seems that this company failed to pay its fire losses and proceedings were taken to enforce the payment of those losses. At least, the company was taken into the Dauphin county court and proceedings there resulted in the appointment of a receiver.

Mr. Solly was appointed that receiver. Upon his application to the Court he was authorized and directed to make an assessment of 45 per cent. The foundation for this assessment, and the subject matters that called for this assessment, are set forth in his petition, and he has testified to them upon the stand.

He testified upon the stand that there were perpetual premiums outstanding, that is, unpaid, amounting to \$5,550.85. That is, there were these perpetual premiums that had been turned into the company and which the company had not yet returned. That there were unpaid fire losses which, with interest, amounted to \$5849.62. That there was a note, or the balance of a note unpaid, which, with interest, amounted to \$598.50, and that the probable expenses in the receivership would be \$3,000. The aggregate of those amounts is \$14,999. But he had what he deemed available assets in his hands amounting to \$1,211.47; so that he was short, in order that the returned perpetual premiums might be returned, that the fire losses might be paid, that this note might be paid and the receiver's expenses paid, he was short \$13,787. In other words, if he had that much more money, according to the judgment of the receiver as indicated by the assessment and by the decree of the Court, he could pay all the liabilities of this company. The assessment was made therefore upon the basis that it required \$13,787 to pay the debts of the company.

Let us take up these items one by one and see if we can aid you in determining whether this defendant is liable for the various items upon which this assessment was made. We will take them

Solly, Receiver, &c., vs. Potts.

up in the manner in which they are treated by the plaintiffs in this suit. They testified that the perpetual premiums received by the company but not returned amounted to \$5550.85. These, as I have already stated, are due when demanded by the persons who paid in the money, but when this company went into the hands of a receiver and was unable any longer to continue this insurance, to give value for the use of this money they had in hand, then this money was payable and returnable by them. They owed this money to the various parties, because they had no right to retain it any longer if they could give no value in return for it. The insurance that a person may have secured by making this deposit would be of no value to him any longer, because the company ceased to do business.

Mr. Potts is liable for this return premium only in this sense, viz.: If these return premiums were used to pay losses and expenses that were incurred during the life of his policy he may be liable for them, because the company now being insolvent, and having used these return premiums to pay losses and expenses, and the company now being called upon to replace those premiums, can call upon the persons who were liable on those premium notes and who received relief by having these premium deposits used in paying off the losses.

Your inquiry will be, were any of those return premiums used from the 9th day of March, 1884, to the 9th day of March, 1885, and were they used for paying losses and expenses of this company. If they were and the company is now called upon to place them back, and have them ready to meet the demands, then it can call upon Mr. Potts for an assessment to pay his proportion of those return premiums that were used, so that they may be restored.

The testimony is that on March 9th, 1884, the company had certain assets invested, and that during that year it called in those assets, those mortgages, those bonds, and that during that year they were exhausted or paid out. Now, I look at the record of the company in evidence, and so far as I am able to ascertain in the year 1884 the company sold some United States bonds amounting to \$1193.75; it also sold or collected a mortgage amounting to \$769.50; it also collected or got the proceeds of a mortgage of Samuel L. Butz, amounting to \$1409.33. The aggre-

Solly, Receiver, &c., vs. Potts.

gate of these is \$3372. This sum so invested, and laid aside by the company, was used during this year in which Mr. Potts' policy was in force, and it was not only called in but the company paid it out during that year. Now, then, what is the conclusion or what inference may you draw from this? because you are to determine what the facts are in this case and from the facts reach a conclusion.

Therefore, your first inquiry will be, Did the two mortgages and the United States bonds represent deposit money from perpetual insurance? If it did, and it was expended during the year in which Mr. Potts' policy was in force, and was expended for paying losses and expenses, then he can be assessed upon his note to return that money, because instead of returning deposit money it would be simply asking him to pay off the losses which were tided over by using these perpetual premium deposits and helping him out. But, as I have said, I could find only \$3372 of the money that was invested was called in during the life of this policy. You have heard the argument of counsel, the statement made by him in which he claims what the amount was and from which the precise items have been given to you, and you will take that into consideration.

Now, they assessed for \$5550, or they assessed \$2200 more than there were assets exhausted by the company (if my calculation is correct) to pay losses and expenses. Therefore, if they assessed for more than they could ask, if you find the facts as I indicated—although you are not bound by my suggestion—that they assessed for \$2200 more than they can recover, \$2200 would be about one-sixth of the whole assessment. The whole assessment basis was \$13,787, and in round numbers they assessed for one-sixth more than they can enforce as to those return premiums.

Gentlemen, you will take this testimony, and if you find that \$3300 of this return premium money was taken and was paid for losses and expenses for which Mr. Potts was liable, then he ought to return his share of it to the fund. It is shown by the books that at least \$3300 of money that was properly invested in mortgages and bonds was called in from March, 1884, to March, 1885, and at the end of the year it was gone. It was paid out so that there was nothing left but \$39.16, according to their books and the testimony in this case.

Solly, Receiver, &c., vs. Potts.

The next item is for fire losses. The undisputed testimony is that the amount represented here, \$5849.62, is for losses; and, as I understand the testimony all around, it is admitted that it is for losses that occurred in the life-time of Mr. Potts' policy. There is no question about that—that the \$5849.62 is for losses that occurred in the life-time of his policy. Therefore, if these moneys are not paid, and they are owed by the company, primarily he is liable and the burden is upon him to show why he ought not to be assessed for it. Has he shown it? He says he was assessed before on two occasions. Yet the fact remains that there is \$5849.62 left unpaid, and that it is for these fire losses. He says, however, he paid money, and that it was used and misapplied for other purposes. If you find that the money he paid in was used by the company to pay losses for which he was not liable, then that would be in his relief. They could not collect from him money and use it for losses that he was not liable for, and then assess him again. You have heard the testimony. He says some notes were paid; but it does not appear, so far as this testimony goes, just what those notes were for—whether for losses or for expenditures in the office, or for debts incurred, or what they were. Primarily, I say, he is liable to be assessed for those losses; and if you find that he has not paid them, it would be your duty to find a verdict against him for that item. If, however, he has paid, then of course he ought not to pay them again; but because he may have paid too much on a former assessment by paying on a loss he was not liable for, will not relieve him in this case. For example, he paid one assessment of twelve per cent., including losses prior to the time that his policy commenced. If he did that he did it voluntarily; and we can not go into this question now and inquire whether it was proper or not that payment should be made, and you can not credit him for any overpayment there. The question is whether he has paid his share for those losses still unpaid; and if he has not he ought, in good conscience and in law, to pay his proportion and share of them.

Now, as to the note—the note of \$598. It appears that after his policy was taken out on the 9th day of March this company borrowed \$2300 on the 8th day of April, and within one year the proceeds of that note were gone; for, as I said, at the beginning of the next year only \$39.16 was left. So they not only paid out these mortgages they collected and bonds called in, but they borrowed

Solly, Receiver, &c., vs. Potts.

\$2300 from the bank, had a note discounted, and that too was paid out. That was spent and paid out during the year. If it was paid for losses occurring during that year, or for losses for which Mr. Potts was liable, then he was liable on that note with all other persons who were insured during the same period. Of that note \$598.53 is left. The other part is paid, and he is not liable for that. All the plaintiffs claim in this case is that he should pay his proportion of this note, because this money was used during the life of his policy to pay losses. If, however, this note was used to pay losses that were prior to his time or when his policy began to run, then he ought not to pay anything.

It appears by a rough calculation that there were losses paid for which Mr. Potts was liable during the year; if not paid during the year, at least for losses during the time of his policy—some \$4750 or \$5000. I may not have taken these figures accurately. I have gone over them as accurately as I can, to help you. I have endeavored to outline what losses were paid that occurred during the life of Mr. Potts' policy, as shown by these books prior to the time that Mr. Solly was put in possession of them; and I find, by a rough calculation, that at least \$5000 were paid for losses which occurred in the life-time of Mr. Potts' policy.

You have heard all the evidence in this case, and you will say whether this note was used in the payment of losses that occurred in the life-time of Mr. Potts' policy. If it was, he ought to pay his proportion of that note, because it is money used by the company, and the company must discharge its obligation as long as it has any assets wherewith to do so.

Then we come to the last question, the question of the receiver; and I shall say very little upon that point. It is a question of law for the court, unless you find that the estimate of these expenses is exorbitant. I fail to find any evidence offered to show that these expenses are exorbitant. Still you can say, from the testimony offered, that they are. You must, however, take into consideration that this estimate was made not as of to-day but as of the time when the assessment was ordered. Neither the court nor Mr. Solly could tell at that time what success he might have with these assessments. Mr. Solly testified upon the stand that he expected a great deal more trouble than he had thus far encountered. What was a proper and fair estimate of the expenses at the time the estimate was made? We

Solly, Receiver, &c., vs. Potts.

may have more light now that might have reduced it; still it may not be too much, even with the light that we do have. But you must judge of the propriety of this estimate as of the time when it was made; otherwise it would not be doing justice to the parties. You have heard what was said about it. I charge you that Mr. Potts, if you find he is indebted to this company—that he owes money, being a debtor to the company—must pay his proportion of the expenses of this receivership; and if these expenses are not exorbitant, then you will allow the assessment. You will find a verdict against him on the basis upon which this assessment was made—a basis of \$3000.

If, however, you find it exorbitant, you will reduce it and reduce the assessment accordingly. Still, you must not do that unless you are clear there is an error in this case. Take into consideration that while three-fourths of this money is collected, yet the other one-fourth may take more money and more time than the three-fourths. It is a little like a collection upon a tax duplicate—the first three-fourths may be collected with less time and money than the remaining one-fourth. It is the parties who are slow and hold back that you have to call on a number of times, and who give the trouble and expense. So, while you may have only \$500 to \$1000 expenses to collect \$10,000, to collect the balance, if collectable, may cost more than has already been expended.

You will take this case and determine from the evidence and from the argument given to you, and such other light as the court may have been able to give you, what your verdict should be in this case.

INDEX.

ACKNOWLEDGMENT.

Defective acknowledgment of wife in sale of her real estate passes no title.
Shrawder vs. Snyder, 66.

AFFIDAVIT OF DEFENCE.

Must be definite. *Furth vs. Fretz*, 206.

APPEAL.

Nunc pro tunc, when not admissible. *Bradley vs. Ritchie*, 36.

Without payment of costs is invalid. *Tyler vs. Bertolet*, 79.

ATTORNEY.

Lien for fees. *Uhlenback et al. vs. Kiefer et al.*, 52.

Compromise by him. *Bank to use vs. Hunsicker*, 73.

ARBITRATION.

Award set aside for treating an arbitrator. *Riding vs. Burkert & Walters*, 153.

AUDITORS.

Report will be set aside if unsupported by the evidence. *Brunner's Estate*, 115.

CHARTER.

Must be devoted to a single purpose. *Old Goschenhoppen Church*, 13.

CORPORATION.

What constitutes fraud in transferring its property. *Dieuelt et al. vs. Montg. Web Co.*, 94.

CONSTABLE.

Elected for three years. *Weikel's Bond*, 70.

CONTRIBUTION.

Contributions assessed cannot exceed damages. *In re Wilbur Street*, 133.

CONSTITUTIONALITY.

Act May 8, 1889, is constitutional. *Widening East Avenue, Jenkintown*, 45.

CONDITIONAL SALE.

What constitutes. *Dearborn vs. Raysor*, 42.

COSTS.

Witnesses not called. *Bank vs. Brodhead*, 132.

Fi. Fa. for costs. *Freyman vs. Bean, et al.*, 163.

CRIMES.

Liquor dealers peddling in another county, guilty of selling without license. *Com. vs. Holstine*, 130.

DAMAGES.

To abutting owners to unopened street in towns. *In re Hamilton Street*, 207.

DIVORCE.

What declarations of libellant are admissible. *Cain vs. Cain*, 34.

Desertion considered. *Poley vs. Poley*, 58.

DOMICILE.

In distribution of personalty. *Wisler's Estate*, 159.

EJECTMENT.

Owner of farm divided by lottery, who gave deeds to the drawers, cannot recover land back. *Allebach vs. Hunsicker*, 39.

Defective acknowledgment of wife in sale of her real estate passes no title.
Shrawder vs. Snyder, 66.

Deed acknowledged puts burden of proving forgery upon party disputing it. *Sutherland vs. Ross*, 203. Competency of Witnesses. *Ibid.*

EQUITY.

Before equity will abate a nuisance, the right must be first established at law. *Mowday vs. Moore*, 126.

Motion to dismiss bill. *Bishop et al. vs. Cowden et al.*, 201.

EXECUTION.

Stoppage of goods in transitu. *Hermann vs. Lumber Company*, 42.

INSURANCE.

Proof of beneficiary when no copy of application accompanies policy. *Trust Co., Guardian, vs. The John Hancock Mutual Life Insurance Co.*, 17.

Insurance Company cannot take advantage of their neglect to attach copy of application to policy. *Trust Company vs. The John Hancock Mutual Life Insurance Co.*, 49.

A set off will be allowed on suit on premium note given for insurance. *Solly, Receiver, &c., vs. Scheetz*, 112.

What premium notes of an insolvent company are liable to be assessed for. *Solly, Receiver &c., vs. Potts*, 209.

JUDGMENT.

Satisfaction of part payment. *Unruh to use, &c., vs. Longstreth*, 33.

Proper practice to revive a judgment against a decedent. *Shannon, Committee, &c., vs. Newton*, 37.

Confessed to "trustee for my creditors" includes a bond accompanying a mortgage. *Jenkins, Trustee, vs. Davis*, 56.

JUSTICE OF THE PEACE.

A justice has no jurisdiction in case of damages for negligence of servant. *Lynch et al. vs. Alderfer*, 108.

Judgments more than 5 years old must be revived before execution can issue. *Pysher vs. Pysher*, 138.

LOTTERY.

Owner of farm divided by lottery who gave deeds to the drawers cannot recover land back. *Allebach vs. Hunsicker*, 39.

LICENSES.

Bottlers' License. Necessity therefor. *Kite's License*, 81.

Sale to person of known intemperate habits. *Konetaki's License*, 82.

Necessity for. *Monaghan's License*, 84.

Petitioners may sign with pencil. *Schoner's License*, 136.

LIQUOR DEALERS.

Peddling in another county guilty of selling without license. *Com. vs. Holstine*, 130.

LANDLORD AND TENANT.

Evidence taken before a justice need not be returned. *Cummings, &c., vs. Young et al.*, 161.

LEASE.

Rescission of. *West vs. Connell*, 196.

MECHANICS' LIEN.

Bill of particulars. Boiler in green-house. *Wethered et al. vs. Garret et al.*, 9.

Right of contractor to defend, where owner admits it to be correct. *Wethered et al., vs. Garret et al.*, 11.

Buildings of Water Co., not subject to. *Guest, Grater & Co. vs. Lower Merion Water Co.*, 21.

Amendments. *Cook vs. Neal*, 147.

Against married women. Sub-contractors. *Bodey & Livingston vs. Thackara et al.*, 149.

Lien against house, will cover materials furnished for a stable. *Bevan & Bro. vs. Thackara et al.*, 170.

Against married women. Rights of sub-contractors. *Bevan & Bro. vs. Thackara et al.*, 173.

Rights of mortgage attaching before a defective lien was amended. *Cook vs. Hoffman et al.*, 176.

MALICIOUS PROSECUTION.

Actions for. *Saunders vs. Landes*, 77.

MUNICIPAL LIEN.

Cannot be filed against properties separated by a public street. *South Bethlehem vs. Davis*, 80.

MUNICIPAL CORPORATIONS.

Liability for imperfect drainage. *Costello vs. Borough of Conshohocken*, 103.

MASTER AND SERVANT.

A justice has no jurisdiction in case of damages for negligence of servant. *Lynch et al. vs. Alderfer*, 108.

MILEAGE.

Not allowed to viewers to change grade. *Reid vs. West Conshohocken*, 205.

MINORS.

Application for support. *Fox's Estate*, 14.

NATIONAL BANKS.

Ownership of deposits. *Wood vs. Bank*, 31.

NEGLIGENCE.

Measure of caution necessary in crossing street railway tracks. *Citizens Passenger Railway Company vs. Thomas*, 61.

What barriers are necessary when repairing a street. *Wood vs. Borough of Bridgeport*, 101.

PARTNERSHIP.

Suits for material furnished by one partner to the firm. *Thropp vs. Richardson*, 20.

PROMISSORY NOTE.

Its negotiability not affected by special provisions. *Bank of Royersford vs. Davis*, 99.

ROADS.

Proceedings to widen. *Widening of East Avenue, Jenkintown*, 45.

Through borough and township. Excessive fees paid to viewers. *Winter Street, Royersford*, 24.

Act of May 8, 1889. *Road and Bridge Viewers*, 154.

RAILROADS.

Injunction to regulate crossing of turnpike roads. *The Chestnut Hill, &c., Turnpike Road vs. Pa. R. R. Co.*, 105.

Whether road is built for private trade or public travel, will not be decided on rule for preliminary injunction. *Dobson vs. Penn. Schuylkill Valley R. R. Co.*, 109.

What constitutes abandonment of a prior location. *Rudolph vs. The Penn. Schuylkill Valley R. R. Co.*, 114.

How to cross a turnpike road. *The Chestnut Hill, &c., Turnpike Road vs. Penn. R. R. Co.*, 121.

Crossing public road. *Township of Moreland vs. The Penn. R. R. Co.*, 165.

Right to appropriate a highway longitudinally. *Township of Moreland vs. The Penn. R. R. Co.*, 167.

REFEREE.

Not bound to decide immaterial questions of fact. *Thomas vs. The West End Coal Co.*, 164.

SUPERVISORS.

Power of to divert water courses on new roads. *Wagner vs. Poley et al.*, 29.

STREETS.

Damages for change of grade. *Geiger vs. Borough of Norristown*.

STREET RAILWAYS.

Measure of caution necessary in crossing street railway tracks. *Citizens Pass. Railway Co. vs. Thomas*, 61.

Contract for paving streets. *Norristown vs. Pass. R. R. Co.*, 185.

Liability for paving streets. *Norristown vs. Citizens Pass. R. R. Co.*, 189.

STATUTE OF LIMITATION.

Debts against decedents. *Irwin's Estate*, 88.

SET-OFF.

A set-off will be allowed on suit on premium note given for insurance. *Solly, Receiver, &c., vs. Scheetz*, 112.

SUNDAY.

Base ball playing. *Com. vs. Parks*, 141.

STREETS.

Damages for change of grade. *Geiger vs. Borough of Norristown*, 157.

SHERIFF'S SALES.

Set aside for inadequate description. *Landes vs. Longaker*, 200.

TRUSTEES.

Responsibilities for acts of co-trustees. *Fesmire's Estate*, 89.

How appointed to hold proceeds of real estate. *Blake's Estate*, 197.

TURNPIKE ROAD.

Method of condemning for public use. *Norristown, &c., Turnpike Road*, 190.

VIEWERS.

Act of May 8, 1889. *Road and Bridge Viewers*, 154.

WILLS.

Construction of. *Fox's Estate*, 14.

Construction of. *Markley's Appeal*, 41.

Lead pencil erasures. *Tomlinson's Estate*, 53.

When parol evidence admissible to explain a latent ambiguity. *Moore's Estate*, 117.

When a court will award an issue *devisavit vel non*. *Hawkins' Appeal*, 178.

Construction of. *Anders et al. vs. Gerhard*, 193.

WIDOW'S EXEMPTION.

Under act 27 Nov., 1865. *Kennedy's Estate*, 26.

WITNESSES.

Competency of a legatee. *Third Nat. Bank, &c., vs. Hunsicker*, 73.

